

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

ZHENKAI SUN, et al.,	:	16-CV-04840(RPK)
Plaintiffs,	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	November 17, 2021
SUSHI FUSSION EXPRESS,	:	9:00 a.m.
INC., et al.,	:	
Defendants.	:	

- - - - - X

TRANSCRIPT OF CIVIL CAUSE FOR TRIAL
BEFORE THE HONORABLE RACHEL P. KOVNER
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: TROY LAW, PLLC
41-25 Kissena Boulevard, Suite 103
Flushing, New York 11355

BY: AARON SCHWEITZER, ESQ.

For the Defendant: SAMUEL & STEIN
1441 Broadway, Suite 6085
New York, New York 10018

BY: MICHAEL SAMUEL, ESQ.
ANDREW BERESIN, ESQ.

Court Reporter: DENISE PARISI, RPR, CRR
Official Court Reporter
Telephone: (718) 613-2605
E-mail: DeniseParisi72@gmail.com

Proceedings recorded by computerized stenography. Transcript
produced by Computer-aided Transcription.

Proceedings

245

1 (In open court; jury not present.)

2 THE COURTROOM DEPUTY: All rise.

3 THE COURT: Please be seated.

4 So I'm happy to hear anything you want to say on the
5 motion, and then if we have some extra time before the jury
6 arrives, maybe we can talk about the jury charge.

7 MR. SAMUEL: Sure.

8 Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. SAMUEL: So my motion for directed verdict is as
11 to several issues. The first is whether Levi Katanov is
12 considered an employer for Zhenkai Sun, Wei Gao, and Charles
13 Chipengule. I don't believe that they introduced any evidence
14 to show that he was their employer. There's no testimony that
15 they know if we he had the ability to hire and fire; there's
16 no testimony that he set their schedule; he didn't supervise
17 them. I think with Wei Gao, the only testimony regarding Levi
18 was that Levi, one time, asked him to make two rolls that were
19 special rolls, so I just don't think there's any evidence that
20 that should get to the jury.

21 THE COURT: Okay.

22 Do you want to respond?

23 MR. SCHWEITZER: Yes, Your Honor.

24 Defense counsel, a moment ago, eluded to the Carter
25 factors, showing authority to hire and fire, showing authority

1 to schedule, showing authority so set wage; however, the
2 Carter factors aren't sufficient to show employment, but are
3 not necessary. The standard is economic reality considered in
4 light of all of the circumstances; and authority over
5 employees does not diminish even when it is infrequently
6 exercised -- *Irizarry v. Catsimatidis*. Here, there is ample
7 circumstantial evidence that both -- well, we are going one
8 issue at a time. So here there is ample circumstantial
9 evidence that Mr. Katanov exercised control over employees at
10 Sushi Fussion Express, including Wei Gao, Zhenkai Sun, and
11 Charles Chipengule. Directed verdict depends on complete
12 absence of evidence in favor of the non-movement or such
13 overwhelming evidence in favor of the movement that a verdict
14 in favor of the non-movement could only be arrived at by
15 surmise or conjecture.

16 THE COURT: What's the evidence you are relying on?

17 MR. SCHWEITZER: Sure. First thing's first. Yang
18 Yang Gao testified -- and there's nothing to contradict
19 this --

20 MR. SAMUEL: Your Honor, I was directing my directed
21 verdict to Wei Gao, Zhenkai Sun, and Charles Chipengule, and I
22 believe that the plaintiff would need to show that Levi was
23 the employer for each one of those three, not in broad
24 strokes, but he was the employer for Charles Chipengule.

25 THE COURT: He might have been referring to Yang

1 Yang Gao's testimony as erring on that.

2 Go ahead.

3 MR. SCHWEITZER: Excuse me.

4 So Yang Yang Gao testified that Mr. Katanov
5 transferred employees from both the Glatt Kosher Supermarket
6 location and from Manhattan to work at Sushi Fussion Express.
7 Wei Gao and Zhenkai Sun both said that Mr. Katanov told them
8 to -- gave them instructions to clean the sushi bar at Sushi
9 Fussion Express, not just to make rolls. Wei Gao did further
10 say, in addition to that, that Mr. Katanov instructed him how
11 to prepare -- excuse me -- how to prepare those special rolls.
12 Mr. Chipengule testified that Mr. Katanov was able to visit
13 him in the kitchen, which is normally an employee only area,
14 and that he gave him instructions on how to prepare sushi
15 ingredients, including sweet potatoes. And while -- excuse
16 me -- and while -- excuse me -- it doesn't go directly to Wei
17 Gao, Zhenkai Sun, or Charles Chipengule, Mr. Katanov did
18 instruct Yang Yang Gao to spread the word of vacancies, even
19 while Yang Yang Gao was working at Sushi Fussion Express
20 showing that he had control over employees at Sushi Fussion
21 Express.

22 MR. SAMUEL: I can just address some of those
23 points.

24 THE COURT: Sure.

25 MR. SAMUEL: First of all, for Wei Gao, I think

1 plaintiffs' counsel mischaracterized the testimony. The only
2 thing Wei Gao said was Levi Katanov one time asked him to make
3 two special rolls that were off the menu. Wei Gao --
4 plaintiffs' counsel asked Wei Gao, "Did you ever observe Levi
5 speaking to any other people?" and the response to that was he
6 heard Levi ask them to clean the bar, but that has no affect
7 on whether Levi was way Gao's employee.

8 THE COURT: Wouldn't the inference be -- you know, I
9 take it that employer status is determined on a person by
10 person basis, but it would the unusual restaurant where a
11 particular person had -- was the employer for some sushi chefs
12 but not other sushi chefs within the same restaurant; right?

13 MR. SAMUEL: Right. But even if you add up the few
14 things that they said, one time Levi asked him to make two
15 rolls. I mean, I read Your Honor's jury instructions, and it
16 says it can be infrequent, but one time? I mean, that's --
17 that's just ridiculous.

18 And as it relates to Charles Chipengule, he didn't
19 instruct him on how to make things; he made suggestions. So I
20 can go into a restaurant and make suggestions, that's not
21 going to make me an employer, so for those reasons, they
22 haven't submitted anything that should even get to the jury as
23 to Levi's individual liability.

24 THE COURT: Okay. I want to give it a little bit of
25 thought, so I will follow the usual practice, and I will defer

1 at this point in time in the case.

2 MR. SAMUEL: Okay.

3 One other matter.

4 THE COURT: Yes.

5 MR. SAMUEL: As it relates to the single enterprise
6 theory, there's been no testimony about Sushi Fussion of 47th
7 Street. There's been no testimony whatsoever. So we believe
8 we are -- we would be entitled to a directed verdict as to
9 Sushi Fussion of 47th Street. And as it relates to Sushi
10 Fussion of Forest Hills, there has been no testimony that any
11 workers -- I don't believe there's been any testimony that any
12 workers went from Sushi Fussion of Forest Hills to any
13 Katanov -- to any Yagudaev restaurants; so, therefore, we feel
14 a directed verdict as to Sushi Fussion Forest Hills would be
15 appropriate.

16 THE COURT: Do you want to respond?

17 MR. SCHWEITZER: Single enterprise depends largely
18 on common ownership and management. 47th Street and Forest
19 Hills were both owned and managed by Mr. Katanov, who is
20 also --

21 THE COURT: Is there evidence of that?

22 MR. SCHWEITZER: It's stipulated. Which -- it's
23 also stipulated that he was the owner and operated Sushi
24 Fussion, LLC, which was the entity operating the Glatt Kosher
25 Supermarket where Yang Yang Gao worked and from which Yang

1 Yang Gao, Albert, and Rico were transferred by Mr. Katanov to
2 Sushi Fussion Express.

3 As for evidence of joint -- sorry -- of joint
4 management between Sushi Fussion Express and the remainder of
5 the Katanov defendants, including Sushi Fussion, LLC, there is
6 that transfer. Similar transfer was --

7 THE COURT: I would just focus on these two.

8 Are these transfers transfers that involved Sushi
9 Fussion Forest Hills and 47th Street?

10 MR. SCHWEITZER: Excuse me. Not directly. Sushi
11 Fussion, LLC, operated the supermarket in the Great Neck
12 location; however, Mr. Gao was transferred from Forest Hills
13 to the supermarket in the first instance.

14 THE COURT: Okay. So as to 47th Street, is it
15 they're just common ownership?

16 MR. SCHWEITZER: Common ownership and common
17 management, yes.

18 MR. SAMUEL: But, Your Honor, I think when they talk
19 about single enterprise and common ownership, they are not
20 talking about common ownership among the restaurants that we
21 say we own versus the restaurants that the Yagudaev defendants
22 own. Common ownership would mean that together all of those
23 restaurants are owned commonly, and there's been zero evidence
24 that any of the four plaintiffs know what the business
25 relationship is. So, yeah, there's common ownership among all

1 the Katanov restaurants, but that does not speak to the issue
2 as to whether those restaurants and the Yagudaev restaurants
3 form a single enterprise.

4 THE COURT: What's the nature of the stipulation?
5 I'll just pull up the language.

6 MR. SAMUEL: I think the stipulation just says which
7 restaurants are owned by Katanov, so it would be circular
8 logic to say since --

9 THE COURT: I see. So there's no stipulation that
10 Katanov has an interest in the Yagudaev, or that Yagudaev has
11 an interest in the Katanov restaurant?

12 MR. SCHWEITZER: No, there isn't. The common
13 ownership goes only so far as Katanov owns. Beyond that, we
14 contend that he exercised management as well as the Yagudaev
15 restaurant.

16 THE COURT: Okay. So just focussing on Sushi
17 Fussion 47th Street for a second.

18 MR. SAMUEL: Sure.

19 THE COURT: So I'm looking at the factors -- four
20 factors: Interrelation of operation, centralized control of
21 labor relations, counter management, and common ownership or
22 financial control. You told me a minute ago, you are relying
23 on common ownership or financial control. Can you spin that
24 out for me? It sounds like what the stipulation is to common
25 ownership or financial control is is just that Mr. -- tell me,

1 what is the common ownership stipulation as to Sushi Fussion
2 47th Street that you think is probative.

3 MR. SCHWEITZER: That would be Number 5, Levi
4 Katanov is an owner of Sushi Fussion, LLC; Sushi Fussion of
5 47th Street; Sushi Fussion of Forest Hills; and Sushi Fussion
6 of NYC.

7 THE COURT: Where are you?

8 MR. SCHWEITZER: So there were two sets of
9 stipulations, Your Honor. Remember the original stipulations
10 in the pretrial order, and the additional stipulations.

11 THE COURT: So we are in the original JPT0?

12 MR. SCHWEITZER: Yes, yes, yes, yes, yes.

13 (Pause.)

14 THE COURT: While I am working on getting that up,
15 the stipulation is essentially that Mr. Katanov owned both
16 Sushi Fussion 47th Street and a bunch of other restaurants,
17 but not the restaurants about which where these folks worked?

18 MR. SCHWEITZER: He owned the Forest Hills location
19 where Yang Yang Gao worked and the supermarket location where
20 Yang Yang Gao worked. The supermarket location was operated
21 by Sushi Fussion, LLC --

22 THE COURT: Can I just ask, is your directed verdict
23 request as to Mr. Yang Yang Gao? As to all the defendants?
24 What is your motion with respect to Sushi Fussion 47th Street?

25 MR. SAMUEL: There's -- the records devoid any

1 mention of Sushi Fussion of 47th Street, so how could they be
2 a single employer with the Yagudaev restaurants? There's --

3 MR. SCHWEITZER: I don't think that's true. There
4 was testimony that -- and one employee was transferred from
5 47th Street to Sushi Fussion Express at around the same time
6 as Yang Yang Gao, Albert, and Rico. I believe that was --

7 MR. SAMUEL: I don't think that was 47th Street.

8 MR. SCHWEITZER: Yeah, it was said to be Manhattan.
9 That's 47th Street.

10 MR. SAMUEL: No. There was a different location in
11 Manhattan. He's referring to Sushi Fussion of NYC. And I'm
12 very sorry to confuse the Court, but he's talking about a
13 restaurant called Sushi Fussion of NYC.

14 THE COURT: Yes.

15 MR. SAMUEL: That's different than Sushi Fussion of
16 47th Street, so there's just zero evidence.

17 THE COURT: Okay. Anything else that anybody wants
18 to say on this issue?

19 MR. SCHWEITZER: No, Your Honor.

20 THE COURT: Okay. I will look at it.

21 Can we talk about the jury charge while we're
22 waiting for the jurors?

23 MR. SAMUEL: Of course.

24 THE COURT: So I think I've tracked, to a large
25 extent, what you guys gave me, and some of the general

1 instructions, I used a federal model rather than -- I think in
2 some cases, there was models that involved, kind of, a State
3 model jury charge. But maybe we can just go through it page
4 by page and you can let me know if you've got -- well, I guess
5 I can think of a couple ways to do this.

6 Have you had a chance to read this?

7 MR. SAMUEL: I did look at a couple of sections that
8 I have a comment on.

9 MR. SCHWEITZER: I was preparing a motion until
10 midnight last night. I did not have a chance to look at it.

11 THE COURT: Sure. I want to give you guys enough
12 time to look at it before we talk about it. I'm happy to give
13 you all a chance to read it through if that's sensible.

14 MR. SAMUEL: If I can indulge the Court for one
15 moment, it might just streamline things.

16 THE COURT: Sure.

17 MR. SAMUEL: I know on page 17, I think we are
18 talking about whether he was paid an hourly rate or a salary.

19 THE COURT: Let me get to where you are, page 17.

20 MR. SAMUEL: Aaron, do you have any position on
21 whether he was salaried or hourly?

22 MR. SCHWEITZER: Excuse me. According to the
23 evidence, he says he was paid salary. According to your
24 client's records, he was paid hourly.

25 THE COURT: So tell me your thought on this

1 instruction.

2 MR. SAMUEL: You know what, Your Honor, we will
3 leave it as is, and I will look through the rest.

4 THE COURT: Okay.

5 MR. SCHWEITZER: On page 2, Your Honor, there's a
6 sentence about the Court asking the witness questions. That
7 has not happened yet. If it does not happen with respect to
8 the one witness remaining, should that be stricken?

9 THE COURT: Sure. I think I probably made it "may"
10 because I was just trying to leave open the possibility that
11 that would occur. I'm happy to take out that sentence. I
12 will highlight it and we'll take it out if it seems
13 inappropriate.

14 MR. SCHWEITZER: When does the Court intend to read
15 the stipulations to the jury?

16 THE COURT: My law clerk might have had the
17 opportunity to create a document that just has the
18 stipulations.

19 THE CLERK: I'm doing it right now.

20 THE COURT: Maybe now is actually a good time,
21 right, because plaintiff has just rested.

22 MR. SCHWEITZER: Yeah, that makes sense.

23 THE COURT: May as well. I will read the
24 stipulation to the jury, and we will mark it and give it to
25 the jurors. We are creating a separate document that has the

1 stipulations.

2 MR. SCHWEITZER: As a Court exhibit?

3 THE COURT: Yes. We should probably add portions
4 from the JPT0.

5 THE CLERK: I'm doing that.

6 Do you want the stipulations as to law in there?

7 THE COURT: No.

8 MR. SAMUEL: Your Honor, do you mind if I step out
9 for one minute?

10 THE COURT: Sure, yes. These jurors have been
11 pretty prompt, so I'm hopeful we will start close to 9:30.

12 MR. SAMUEL: Okay.

13 (A recess in the proceedings was taken.)

14 THE COURTROOM DEPUTY: Just two more jurors, Judge.

15 THE COURT: Great.

16 MR. SCHWEITZER: On page 12, when he's talking about
17 Yang Yang Gao, where he worked, it says the parties have not
18 stipulated --

19 THE COURT: Let's wait until defense counsel is
20 back.

21 (Pause.)

22 MR. SAMUEL: Your Honor, do you mind if we take five
23 minutes. I will be as quick as I can. Is the jury all here?

24 THE COURTROOM DEPUTY: Not yet.

25 MR. SAMUEL: I am in this room across the hall.

1 THE COURT: Okay. We will go look for you when
2 we've got all the jurors here. You are going to be --

3 MR. SAMUEL: Where the viewing room is.

4 THE COURTROOM DEPUTY: Overflow courtroom, okay.

5 THE COURT: Great.

6 THE COURTROOM DEPUTY: Thank you.

7 (A recess in the proceedings was taken.)

8 THE COURTROOM DEPUTY: Judge, the jury is here.

9 Do you want me to get them?

10 THE COURT: Sure.

11 THE COURTROOM DEPUTY: Okay.

12 (Pause.)

13 (Jury enters.)

14 THE COURT: Okay. Welcome back. We are in the
15 homestretch, I think.

16 Are the parties comfortable with my -- my law clerk
17 is creating a printout -- with reference to the stipulations,
18 are the parties comfortable with my just reading from the JPT0
19 and from the document you gave me -- the subsequent
20 document -- without giving you that printout first?

21 MR. SCHWEITZER: Yes, Your Honor.

22 MR. SAMUEL: Yes.

23 THE COURT: All right. So I want to read to you a
24 stipulation. That just means it's something that both parties
25 have agreed on. They are facts that both parties have agreed

1 are true, and I will give you are written copy of the
2 stipulations too for you to consider when you deliberate, but
3 I wanted to read those stipulations to you now.

4 One, Sushi Fussion, LLC, is a New York limited
5 liability company that operated the Sushi Fussion location
6 inside Main Glatt Supermarket, 6938 Main Street, Flushing,
7 New York 11367 from the start of a period relevant to this
8 lawsuit through on or about October 19th of 2013; and it has
9 operated the Sushi Fussion location at 613 Middle Neck Road,
10 Great Neck, New York 11023 throughout the period relevant to
11 this lawsuit.

12 Sushi Fussion of 47th Street, Inc., is a New York
13 company that has operated the Sushi Fussion location at 26
14 West 47th Street, New York, New York 10036 throughout the
15 period relevant to this lawsuit.

16 Sushi Fussion of Forest Hills, Inc., is a New York
17 corporation that has operated the Sushi Fussion location at
18 105-43 64th Road, Forest Hills, New York 11375 throughout the
19 period relevant to this lawsuit.

20 Sushi Fussion of NYC, Inc., is a New York
21 corporation that has operated the Sushi Fussion location at
22 224 West 35th Street, New York, New York 10001 throughout the
23 period relevant to this lawsuit, but which location is now
24 closed.

25 Leva Katanov is an owner of Sushi Fussion, LLC;

1 Sushi Fussion of 47th Street, Inc.; Sushi Fussion of Forest
2 Hills, Inc.; and Sushi Fussion of NYC, Inc.

3 All the corporate defendants at one point shared a
4 common website which lists all the Sushi Fussion restaurant
5 locations, but they no longer do so. On the common website,
6 Sushi Fussion tells its customers, quote, "For live sushi bars
7 at your event, call Leo at" -- and then it provides a
8 telephone number.

9 Yang Yang Gao was hired by Leva Katanov. Defendants
10 were engaged in interstate commerce and covered employees
11 under the Fair Labor Standards Act.

12 Yang Yang Gao.

13 Yang Yang Gao worked for Sushi Fussion, LLC, at 4938
14 Main Street, Flushing, New York 11367 from September 12th of
15 2011 through October 19th of 2013. Yang Yang Gao worked for
16 Sushi Fussion Express, Inc., at 71-32 Main Street, Flushing
17 New York 11367 from October 20th, 2013, through October 2nd of
18 2016. From October 20th, 2013, through October 2nd, 2016, at
19 71-32 Main Street, Flushing, New York 11367, Yang Yang Gao
20 worked 63 hours and ten minutes per week from 10:30 a.m.
21 through 9:50 p.m. on Sundays, Mondays, Tuesdays, Wednesdays,
22 and Thursdays, and from 10:30 a.m. through 5:00 p.m. on
23 Fridays.

24 Wei Gao.

25 Wei Gao worked for Sushi Fussion Express, Inc., at

1 71-32 Main Street, Flushing, New York 11367 from July 1st,
2 2015, through July 29th of 2015 as a sushi chef. Throughout
3 his employment, Wei Gao worked for 56 hours and ten minutes
4 per week from 10:30 a.m. through 10:00 p.m. on Mondays; from
5 11:30 a.m. through 11:00 p.m. on Tuesdays and Thursday; from
6 10:00 a.m. through 5:00 p.m. on Fridays; from 9:30 p.m. to
7 12:30 a.m. on Saturdays; and from 11:30 a.m. through
8 11:00 p.m. on Sundays.

9 Throughout his employment, Wei Gao was paid \$750 per
10 week. Based on his hours stated above, Wei Gao has \$25,264.29
11 in overtime wages -- in unpaid overtime wages, and \$4,210.71
12 in unpaid spread of hours compensation. The liquidated
13 damages for Wei Gao, based on his unpaid overtime wages and
14 spread of hours compensation are \$29,475.

15 Throughout his employment, Wei Gao was not furnished
16 with a wage notice compliant with Section 195.1 of the
17 New York Labor Law. Wei Gao's wage notice damages are \$5,000
18 because he was not furnished with a wage notice compliant with
19 Section 195.1 of the New York Labor Law. Throughout his
20 employment, Wei Gao was not furnished with wage statements
21 compliant with Section 195.3 of the New York Labor Law. Wei
22 Gao's wage statement damages are \$5,000 because he was not
23 furnished with wage statements compliant with Section 195.3 of
24 the New York Labor Law.

25 Zhenkai Sun.

1 Zhenkai Sun worked for Sushi Fussion Express, Inc.,
2 at 71-32 Main Street, Flushing, New York 11367 from April 1st
3 of 2014 through June 30th of 2015 as a sushi chef. Throughout
4 his employment, Zhenkai Sun worked 56 hours and 30 minutes per
5 week from 10:30 a.m. through 10:00 p.m., Sundays, Tuesdays,
6 Wednesdays, and Thursdays; from 10:00 a.m. through 5:00 p.m.
7 on Fridays; and from 9:30 p.m. through 1:00 a.m. on Saturdays.
8 Throughout his employment, Zhenkai Sun was paid \$775 per week.
9 Based on his hours stated above, Zhenkai Sun has \$30,158.57 in
10 unpaid overtimes wages, and \$5,026.43 in unpaid spread of
11 hours compensation. The liquidated damages for Zhenkai Sun,
12 based on his unpaid overtime and spread of hours compensation
13 are \$31,185.

14 Throughout his employment, Zhenkai Sun was not
15 furnished with a wage notice compliant with Section 195.1 of
16 the New York Labor Law. Zhenkai Sun's wage notice damages are
17 \$5,000 because he was not furnished with a wage notice
18 compliant with Section 195.1 of the New York Labor Law.

19 Throughout his employment, Zhenkai Sun was not
20 furnished with wage statements compliant with Section 195.3 of
21 the New York Labor Law. Zhenkai Sun's wage statement damages
22 are \$5,000 because he was not furnished with wage statements
23 compliant with Section 195.3 of the New York Labor Law.

24 Charles Chipengule.

25 Charles Chipengule worked for Sushi Fussion Express

1 Inc., at 71-32 Main Street, Flushing, New York 11367 from
2 November 1st of 2013 through December 31st of 2014 as a
3 kitchen helper. From November 1st of 2013 through
4 December 31st of 2014, at 71-32 Main Street, Flushing,
5 New York 11367, Charles Chipengule worked 73 hours per week
6 from 10:00 a.m. through 10:30 p.m. on Sundays, Mondays,
7 Tuesdays, Wednesdays, and Thursdays; and from 10:00 a.m.
8 through 5:00 p.m. on Fridays; and from 9:30 p.m. through
9 1:00 a.m. on Saturdays. From November 1st, 2013, through
10 December 31st, 2014, Charles Chipengule was paid \$11 per hour,
11 including for overtime hours. He was not paid time-and-a-half
12 for overtime hours or an extra hour's pay for days when his
13 spread of time exceeded ten hours.

14 Charles Chipengule worked for Hibachi Express, Inc.,
15 at 141-25 Jewel Avenue, Flushing, New York 11367 from
16 March 1st of 2015 through May 31st of 2015. From March 1st of
17 2015 through May 1st of 2015, at that address, Charles
18 Chipengule worked 80 hours and 30 minutes per week from
19 10:00 a.m. through 12:00 a.m. on Sundays, Mondays, Tuesdays,
20 Wednesdays, and Thursdays; from 10:00 a.m. through 5:00 p.m.
21 on Fridays; and from 9:30 p.m. through 1:00 a.m. on Saturdays.
22 From March 1st of 2015 through May 31st of 2015, Charles
23 Chipengule was paid \$11 per hour, including for overtime
24 hours, and was not paid time-and-a-half for overtime hours or
25 an extra hour's pay for days when his spread of time exceeded

1 ten hours.

2 Charles Chipengule worked for Sushi Fussion Express,
3 Inc., at 71-32 Main Street in Flushing, New York 11367 from
4 June 1st of 2015 through November 30th, 2015. From June 1st,
5 2015, through November 30th, 2015, at 71-32 Main Street,
6 Flushing, New York 11367, Charles Chipengule worked 80 hours
7 and 30 minutes per week, from 10:00 a.m. to 12:00 a.m. on
8 Sundays, Mondays, Tuesdays, Wednesdays, and Thursdays; from
9 10:00 a.m. through 5:00 p.m. on Fridays; and from 9:30 p.m.
10 through 1:00 a.m. on Saturdays.

11 From June 1st of 2013 through November 30th, 2015,
12 Charles Chipengule was paid \$12.50 per hour, including for
13 overtime hours, and was not paid time-and-a-half for overtime
14 hours or an extra hour's pay for days when his spread of time
15 exceeded ten hours.

16 Based on his hours, as stated above, Charles
17 Chipengule has \$20,865.59 in unpaid overtime wages, and
18 \$5,768.93 in unpaid spread of hours compensation. The
19 liquidated damages for Charles Chipengule, based on his unpaid
20 overtime wages and spread of hours compensation, are
21 \$26,643.52.

22 Throughout his employment, Charles Chipengule was
23 not furnished with a wage notice compliant with Section 195.1
24 of the New York Labor Law. Charles Chipengule's wage notice
25 damages are \$5,000 because he was not furnished with a wage

1 notice compliant with Section 195.1 of the New York Labor Law.

2 Throughout his employment, Charles Chipengule was
3 not furnished with wage statements compliant with
4 Section 195.3 of the New York Labor Law. Charles Chipengule's
5 wage statement damages are \$5,000 because he was not furnished
6 with wage statements compliant with Section 195.3 of the
7 New York Labor Law.

8 Okay. So that's the end of the stipulation. Those
9 are some facts that the parties agree on in this case, and I
10 will give you a written copy of that stipulation, too, when
11 you are deliberating.

12 So it's defense case.

13 MR. SAMUEL: Sure. We would like to call Levi
14 Katanov to the stand.

15 THE COURT: Great.

16 (Witness takes the stand.)

17 THE COURTROOM DEPUTY: Mr. Katanov, please stand and
18 raise your right hand.

19 (Witness sworn.)

20 THE WITNESS: Yes.

21 THE COURTROOM DEPUTY: Thank you. Please be seated.

22 (Continued on next page.)
23
24
25

1 **LEVA KATANOV,**

2 called as a witness, having been first duly
3 sworn/affirmed, was examined and testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. SAMUEL:

7 Q Good morning.

8 A Good morning.

9 Q Please state your name for the record.

10 A Leva Katanov, L-E-V-A K-A-T-A-N-O-V.

11 Q Are you known by any other names?

12 A Yeah.

13 Q What names?

14 A Levi, Leo.

15 Q Okay. And can you please tell the jury what your
16 relationship is with Sushi Fussion, LLC?

17 A I am part owner.

18 Q Okay. What is Sushi Fussion, LLC?

19 A It's a restaurant. Sushi restaurant.

20 Q Okay. And you said you are part owner. Who are the
21 other owners of that LLC?

22 MR. SCHWEITZER: Relevance.

23 THE COURT: Overruled.

24 THE WITNESS: I need to answer?

25 THE COURT: Yes, you can answer.

1 THE WITNESS: I'm sorry?

2 THE COURT: Yes, you can answer.

3 A Robert Gurgov and Isaac Baayev.

4 Q Those are your only partners in that entity?

5 A Yes.

6 Q Okay. How long have you owned Sushi Fussion, LLC?

7 A Since 2011.

8 Q Okay. And if you could please tell the jury what
9 location you first opened Sushi Fussion, LLC?

10 A The Forest Hills location.

11 Q Okay. What was the address?

12 A 115-43 64th Road, Forest Hills, New York 11375.

13 MR. SCHWEITZER: Objection.

14 Which locations were operated by which entities is
15 stipulated to.

16 THE COURT: Overruled.

17 I let you do plenty of background.

18 BY MR. SAMUEL:

19 Q Okay. Can you tell the jury what -- how many people
20 worked at Sushi Fussion at the Forest Hills location when you
21 first opened?

22 A Two.

23 Q How many?

24 A Two.

25 Q Okay. What were those people? What type of workers?

1 A Sushi chefs.

2 Q Aside from the sushi chefs, did anyone else work there?

3 A I worked there.

4 Q And do you remember when in 2011 it was that you opened
5 up that location?

6 A April -- April 7th, I believe.

7 Q Okay. And at some point in time, did you open up a
8 second location?

9 A Yes.

10 Q And where was that second location?

11 A 69-38 Main Street. It was inside Main Glatt Supermarket.

12 Q Is it fair to say that was a kiosk, or something else?

13 A Kiosk. Sushi stand inside of supermarket.

14 Q When did you open up the kiosk inside of Main Glatt?

15 A August, I believe, of 2011.

16 Q Was that a sit-in restaurant, a takeout entity, or
17 something else?

18 A It was a sushi stand, so all take out, deliveries.

19 Q Okay. How many people worked at that location when you
20 first opened?

21 A It was myself, two sushi chefs, and a -- I had a counter
22 person, and a delivery guy.

23 Q Okay. Are you familiar with the plaintiff in this case,
24 Yang Yang Gao?

25 A Yes.

Katanov - Direct - Samuel

268

1 Q And how are you familiar with him?

2 A I hired him.

3 Q Okay. What did you hire him to do?

4 A To be a sushi chef.

5 Q At what location?

6 A I hired him to be a chef inside the supermarket, but I
7 originally had him trained in the Forest Hills location until
8 the supermarket opened up.

9 Q Okay. And do you recall when it was that he started
10 working inside of the Glatt supermarket?

11 MR. SCHWEITZER: This is stipulated to.

12 THE COURT: So I let both parties educe some facts
13 to provide context even though they were stipulated. I will
14 let him educe some facts that provide context although they
15 are stipulated.

16 Go ahead.

17 A Can you repeat the question, please?

18 MR. SAMUEL: If the court reporter can read that
19 question back.

20 (Record read.)

21 A Me or Yang Yang Gao?

22 Q Yang Yang Gao.

23 A As soon as we opened in August.

24 Q What were his job duties when you first hired him to work
25 inside the Glatt Supermarket?

1 A He ran the sushi bar. He made sushi. He did all the
2 ordering. He would send me the orders on a daily basis. He
3 would take inventory every day. He would also interview new
4 chefs. He would also have a say in the hiring and the firing.
5 He would make sure that the sushi bar ran smoothly on a daily
6 basis. He was my guy that ran that sushi stand inside the
7 supermarket.

8 Q So when you said he made orders, what does that mean?

9 A Well, every time we get an order in the store, he would
10 make sure it's done either by himself or by a different sushi
11 chef.

12 Q So you are talking about he made sushi rolls?

13 A That's right.

14 Q Okay.

15 A Or anything else that's involved in the order: soups,
16 salads, fried rolls.

17 Q And if you could please tell the jury, how did it work
18 with the ordering system at the Glatt Supermarket?

19 A Okay. So we had a counter person. We had a phone. We
20 had a POS system. A customer would either call in an order or
21 walk up an order in person. Once the order is input into the
22 system, there's a ticket that's printed out. That ticket is
23 then handed over or hung on a order stick where then the --
24 Eddie would take the order -- I said "Eddie," because he was
25 also known as Eddie, Yang Yang Gao -- he would take the order

1 and either himself or the other chef would have done it.

2 Q How would it be decided who would make the roll?

3 MR. SCHWEITZER: Hearsay.

4 THE COURT: Do you want to rephrase the question?

5 BY MR. SAMUEL:

6 Q Whose responsibility would it be to make the role when a
7 ticket came in?

8 A It was his responsibility.

9 Q "His," meaning Yang Yang Gao?

10 A Yang Yang Gao.

11 Q And would Yang Yang Gao decide if he would make the role
12 or the other sushi chef?

13 MR. SCHWEITZER: Hearsay.

14 MR. SAMUEL: He's the owner, so, I mean...

15 THE COURT: Excuse me one second.

16 Do you want to rephrase the question?

17 A Who would decide?

18 Q Yes. Who would decide?

19 A It was up to Eddie. If he was busy with something else,
20 he would tell the other chef to do it. If he wasn't, he would
21 do it himself. If it was a big order, they will do it
22 together, but it was his responsibility to make sure the order
23 goes out on time.

24 Q When you say "Eddie" again, you are referring to Yang
25 Yang Gao?

1 A I'm sorry?

2 Q When you say "Eddie," you're referring to Yang Yang Gao?

3 A Exactly. That's his English name.

4 Q Did you give Yang Yang Gao -- or Eddie, as you call
5 him -- authority to dictate who would make a roll?

6 A That's right.

7 Q Okay. And did you, in fact, give authority to Yang Yang
8 Gao to make that decision?

9 A Yes.

10 Q Now, you said a few moments ago that one of Yang Yang
11 Gao's responsibilities would be to do inventory.

12 A That's right. On a daily basis, he would have to look
13 through the inventory to make sure that we have everything for
14 the next day, if we are low on anything, like the fish, the
15 vegetables, any containers, bags, he would send me an order on
16 a daily basis, and then I would place the order, and then he
17 would have it delivered to the store the next day.

18 Q And did you ever question when he wanted to order
19 something?

20 A No. Whatever he said, I ordered. I trusted him.

21 Q You mentioned also one of his responsibilities was to
22 interview chefs.

23 Can you please explain to the jury what that means?

24 A Sure.

25 So if we needed a new chef, for whatever reason, if

Katanov - Direc - Samuel

272

1 the other one was leaving, or we had to let him go because he
2 couldn't handle the workload, I would ask Eddie to find a
3 chef, he would advertise on his Chinese platforms in his own
4 language, then somebody would call him, and he would bring him
5 in for an interview. There were times when I was there
6 present for the interview, and there were times that I was not
7 present. But he would tell me, this guy is good, we could
8 take him; or he would say, you know what, let's give him a
9 week, and if he can handle, we take him. If not, we can find
10 another guy. I said all right. He knows. It's best for you
11 that you get a good guy, because he's working with you, and
12 that's the way it went.

13 (Continued on next page.)

14
15
16
17
18
19
20
21
22
23
24
25

Denise Parisi, RPK, CRR
Official Court Reporter

Katanov - direct - Samuel

273

1 BY MR. SAMUEL: (Continuing.)

2 Q And did Eddie make recommendations as to who to hire and
3 who not to hire?

4 A He always said this guy is good let's keep him or, you
5 know what, I will bring another guy in, let's forget about
6 him.

7 Q And how often would you listen to Yang Yang Gao's
8 recommendations when it came to who to hire?

9 A Always.

10 Q Would there be times when Yang Yang Gao would interview a
11 sushi chef when you weren't present?

12 A Yeah, there would be times.

13 Q Did Yang Yang Gao ever hire anybody without discussing it
14 with you first?

15 A I always had the authority to hire and fire but I always
16 went according to his recommendation.

17 Q And how much was Yang Yang Gao paid on a weekly basis?

18 A He started at 750 when he worked in Forest Hills during
19 his training period, about a month. And once we opened the
20 supermarket we gave him 850 because he was managing the store.

21 Q And when you say 850, that's per week?

22 A Per week.

23 Q Was that paid in cash, check or something else?

24 A He used to get one week cash the second week a \$300 check
25 and the rest in cash.

1 Q You mentioned that there was a counterperson inside of
2 the kiosk. Did you give Yang Yang Gao authority to manage the
3 counter person as well?

4 A Can you repeat that?

5 Q You mentioned that there was a counterperson.

6 A Okay.

7 Q Did you give Yang Yang Gao authority to manage the
8 counterperson as well?

9 MR. SCHWEITZER: Leading.

10 THE COURT: Overruled.

11 A Yes, I didn't directly tell him, listen, you have to make
12 sure to listen to Eddie, but the counterperson listened to
13 Eddie because he had to make sure that the orders went out
14 smoothly and Eddie would control the orders. So, yes, the
15 counterperson did listen to Eddie whatever he said to do.

16 MR. SCHWEITZER: Hearsay, ask to be stricken.

17 MR. SAMUEL: That wasn't hearsay.

18 MR. SCHWEITZER: He was asked whether he told --

19 THE COURT: Wait a second. Overruled.

20 MR. SCHWEITZER: Sidebar, Your Honor.

21 (Sidebar held outside of the hearing of the jury.)

22 (Continued on next page.)

23

24

25

1 (The following sidebar took place outside the
2 hearing of the jury.)

3 MR. SCHWEITZER: He was asked did you give the --
4 sorry, did you give Yang Yang Gao authority to direct the
5 counterperson and he answered no, I did not, but the
6 counterperson listened to Yang Yang Gao anyway.

7 THE COURT: So, speaking for what the counterperson
8 would do, I ruled on this objection. You can't have sidebars
9 on something I already ruled on.

10 MR. SCHWEITZER: It's not responsive. He's saying
11 something that the counterperson would do other -- he's saying
12 what the counterperson would do as a matter of the
13 counterperson's subjective judgment not as a matter of
14 authority he gave to Yang Yang Gao or as a direction that he
15 gave to the counterperson -- he didn't say to the
16 counterperson -- he didn't say to Eddie, you have authority
17 over the counterperson.

18 THE COURT: Please stop. There are two issues here.
19 The objection as stated, is overruled. You can't have
20 sidebars every time you disagree. State your objection in one
21 word. If there is something you need to clarify, I will ask
22 you or I will ask your opponent to clarify. We can't have all
23 of these sidebars.

24 MR. SCHWEITZER: Note my objection to this.

25 (Sidebar ends.) (Continued on next page.)

1 (Continuing.)

2 THE COURT: Next question. I think he answered the
3 question. What is your next question?

4 BY MR. SAMUEL:

5 Q You mentioned that Yang Yang Gao's responsibility was to
6 make sure that the sushi bar ran smoothly. What does that
7 entail, to make a sushi bar run smoothly?

8 A Every time you got an order it had to be made promptly.
9 He had to make sure that we have all the ingredients that we
10 need for every day. He had to cut things up and make sure we
11 were ready whether it was by himself or with his helper, the
12 second sushi chef. He had to make sure the deliveries went
13 out on time as well. You know, if he didn't make it on time
14 then there wouldn't be sent on time and then we have sad
15 customers and it's bad for business.

16 So what is there to be coming in, he had to be
17 making them, they have to be done and sent out on time.
18 That's called running smoothly. We always need the inventory
19 we need for that day he would know how much to order every
20 day. Some days are busy some days aren't busier but he would
21 already know.

22 Q You mentioned a delivery guy was part of running of sushi
23 bar, managing the delivery person as well?

24 MR. SCHWEITZER: Leading.

25 THE COURT: Overruled.

1 A Yes.

2 Q And in what way did he manage the delivery guy?

3 A Well, if -- when they made the orders they would not pack
4 the orders. The sushi chefs would make the rolls put them in
5 containers and put them on the counter, in the packing station
6 and the delivery guy would pack them, if he was around. If he
7 was on a delivery, the counterperson would pack them and the
8 delivery guy would come in and the orders have to be sent out
9 and the chefs would be the ones who you can say send orders
10 out because they made the orders and the sous-chef can -- the
11 delivery guy can take out them. But the orders were not
12 made -- the delivery guy cannot take the order out so he was
13 directly affected by the delivery as well, their performance.

14 Q And would Yang Yang Gao have contact with the delivery
15 person?

16 A Yes, yes, of course.

17 Q And did you ever witness any interactions? What would a
18 typical interaction be?

19 MR. SCHWEITZER: Hearsay.

20 THE COURT: Overruled.

21 A There were a lot of times where sushi trays, the
22 containers, were piling up on the counter, the packing station
23 and the delivery guy would be outside smoking or on the phone
24 and say let's go, we have to clear out the station. Everyone
25 is coming in. I need space, pack them up and send them out.

1 We have to keep the place flowing.

2 Q Would the delivery guys listen?

3 A Most of the time, but again nobody is perfect.

4 Q How long did Yang Yang Gao work for you in that location?

5 A About two years.

6 Q And do you know if Yang Yang Gao ever took breaks during
7 the day?

8 A Yes, of course.

9 Q And how long would the breaks typically be?

10 A He had an hour lunch break and then any time it wasn't
11 busy, he went out for a cigarette, for a phone call, sit down
12 and rest if you need to be. As long as it ran smoothly, I
13 didn't mind him taking breaks, as many as he needed.

14 Q Okay. And are you familiar with somebody named Michael
15 Yagudaev?

16 A Yes.

17 Q How do you know him?

18 A He's a friend of mine.

19 Q And when did you and he first interact?

20 A We met around the same time I opened my first location.
21 He was good friends with my partner, Robert, for many years.

22 Q Okay. Did you and Michael ever own any restaurants
23 together?

24 A No.

25 Q Did Michael Yagudaev ever have any interest in Sushi

1 Fussion LLC?

2 A No.

3 Q Did Michael Yagudaev have any interest in Sushi Fussion
4 of Forest Hills, LLC?

5 A No.

6 Q How about Sushi Fussion on 47th Street?

7 A No.

8 Q Did you have any business relationship with Michael
9 Yagudaev?

10 A Other than that he paid me a commission of 5 percent
11 after he opened his Sushi Fussion Express, no other business.

12 Q Let's talk about that for a few minutes so the jury is
13 clear.

14 A Sure.

15 Q What do you mean he opened up a Sushi Fussion Express?

16 A He approached my partner Robert one day -- my friend from
17 childhood. He approached him saying he's tired of being a
18 barber and he was looking for a new industry to get into and
19 he saw that we're successful; we opened two locations within
20 one year. He said, do you guys think that I can open up
21 something maybe with your name and we can do something. We
22 thought about it. We said, you know what, we found out that
23 Main Lot was closing at that same time, the supermarket was
24 closing. We said we're pretty busy at the Forest Hills
25 location and we offered him the opportunity to open up his own

Katanov - direct - Samuel

280

1 store under our name using our Sushi Fussion trademark and he
2 would pay us a 5 percent royalty fee from gross income and he
3 thought about it and agreed to it.

4 Q And the name of that store you're referring to is what?

5 A It's d/b/a Sushi Fussion and the legal name was Sushi
6 Fussion Express.

7 Q And do you know if that was a legal entity?

8 A Yes, of course.

9 Q Okay. And do you know who owned the shares of that
10 entity?

11 A Michael Yagudaev.

12 Q And you don't own any shares of that entity?

13 A No.

14 Q So, you testified a few minutes ago that you would get 5
15 percent of -- was that the gross sales?

16 A Yes.

17 Q And did he, in fact, pay you?

18 A For the first, about, six months he paid. Business was
19 doing well and he paid us and after six months it started
20 declining and he was barely making ends meet. So we basically
21 felt bad for him and we said, you know what, we're not
22 charging you anymore. Keep up your business, improve what you
23 can, but you don't have to pay us anymore. Be sure you're
24 okay.

25 Q So did any of the employees that worked for you at Sushi

Katanov - direct - Samuel

281

1 Fussion LLC either in the Forest Hills location or the glatt
2 store, would those employees ever, like, switch back and forth
3 between your restaurant and the Yagudaev restaurant?

4 A No.

5 Q And were your employees kept on your books and his
6 employees kept on his books?

7 A Correct.

8 Q And just so the record is clear and the jury understands,
9 did you and Michael Yagudaev share a common set of financial
10 books?

11 A No.

12 Q Did you have any bank accounts together?

13 A No.

14 Q And when you paid your workers you paid them out of the
15 corresponding bank account from the entity that they worked
16 for for you?

17 A Correct.

18 Q And did you ever pay any workers that worked at Sushi
19 Fussion Express?

20 A No.

21 Q Now, in the glatt kiosk, who was the person that made the
22 most amount of money?

23 A Eddie, Yang Yang Gao.

24 Q And why was that?

25 A Because he was the person who had the most

Katanov - direct - Samuel

282

1 responsibilities at that location.

2 Q Okay. Is the glatt location still operating?

3 A No.

4 Q And what, if anything, happened with the workers that you
5 had at the glatt supermarket after it closed?

6 A Before we were closing about a week or so, Michael was
7 opening his store and Michael approached me and said, listen,
8 what are you doing with your chefs, are they going to go to
9 any other locations. I said I don't have anything in other
10 locations. If you have a job you can offer them I said. And
11 Michael approached Eddie and said would you like to work for
12 me.

13 They spoke on their own. I had nothing to do with
14 that conversation and they came and told me and as soon as
15 Main Lot closed it was about a week, it was a week lag time
16 because he wasn't ready to open. About a week after Main Lot
17 closed Sushi Fussion opened, Michael Yagudaev opened it, and
18 he hired Eddie and Eddie went to work over there.

19 MR. SCHWEITZER: I ask that the portion of the
20 statement referring to Michael and Eddie speaking on their own
21 and coming to an agreement be stricken as speculative.

22 THE WITNESS: I was not at that conversation.

23 THE COURT: So I will direct the jurors to disregard
24 that portion is as to if there were conversations between
25 Michael and Eddie.

1 BY MR. SAMUEL:

2 Q Do you know if Eddie or Yang Yang Gao ever in fact did
3 work for Michael Yagudaev after the glatt store closed?

4 A Yes, I saw him working there. I saw him working in
5 Michael's store.

6 Q Were there any other workers that worked at the glatt
7 kiosk that also went to work for Sushi Fussion Express?

8 A I believe Albert also, the counterperson, may have as
9 well. Let me rephrase that. He was hired by him.

10 Q Now, did you ever go to visit the Sushi Fussion Express
11 restaurant?

12 A Yes, of course.

13 Q And how often would you go to visit that store?

14 A Whenever I was in the area I would stop by and see my
15 friends, see Michael, see how things are going with him and he
16 would tell me, do me a favor, come inside, look at the
17 kitchen, look at the bar area, do you see anything I can
18 improve in. You're in the business longer than I am. I
19 mentored him. I took a stroll and pointed things out.

20 And at times the sushi bar would be a little bit
21 messy. You have to speak with your guys, this is not
22 acceptable, you should not let them run a bar like this. It
23 has to be neat because customers can see what's happening
24 behind the bar when they're waiting for the orders. I would
25 come in the kitchen and look around. There was one point I

Katanov - direct - Samuel

284

1 saw, I believe, Charles, he was cutting a sweet potato. And I
2 told him Charles is doing a great job and Michael speaks very
3 highly of you and I told him that in one of my locations my
4 kitchen guy taught me that if you cut the sweet potato a
5 little thinner they fry faster and the order goes out faster
6 and the customer is happier. He said, thank you, I didn't
7 know that and he took it and implemented it and it worked.

8 Q And how many times did it happen with Mr. Chipengule?

9 A With Chipengule, one time.

10 Q And that was the sweet potato?

11 A Yes.

12 Q And when you told him to cut it thinner was that a
13 suggestion on your part?

14 A It was strictly a suggestion. It was up to him what he
15 wanted to do.

16 Q Now, how about Wei Gou is?

17 A Yeah.

18 Q And who is Wei Gou in relation to this case?

19 A He was a sushi chef that worked for Michael at Sushi
20 Fussion Express.

21 Q Did you ever have any interaction with Wei Gou when he
22 worked at Sushi Fussion Express?

23 A I think there was one instance where I walked in and he
24 was making a sushi roll and it didn't look exactly perfect,
25 you can say, and I did point out. I said, you know, Wei if

Katanov - direct - Samuel

285

1 you can make it a little bit better -- basically fish was
2 sticking out from the ends. I told him if you push it in with
3 your hand, I have seen chefs in other locations how they make
4 the rolls. It looks nicer to the customer. I pointed it out
5 if you push the fish in from both ends it doesn't look as
6 messy and the roll looks bigger and the customer would be
7 happier and he said I will do that. He remade that roll when
8 I was talking to him.

9 Q And how many times did an interaction like that occur
10 between you and Wei Gou?

11 A As far as I remember, it was that one time.

12 Q And when you told him to push the fish in, was that a
13 suggestion on your part or an order on your part?

14 A A suggestion. They didn't have to listen to me. I
15 wasn't his boss.

16 Q Now, at the Sushi Fussion Express restaurant, did you
17 ever supervise anybody that worked there?

18 A No.

19 Q Did you ever manage anybody that worked there?

20 A No.

21 Q Was there ever any business relationship between you and
22 Michael related to that store?

23 A The only relationship we had with him in regards to
24 business is when I came once a week to pick up the check and
25 that's it.

Katanov - direct - Samuel

286

1 Q Okay. And of all the workers that worked for the Sushi
2 Fussion Express did you ever set anybody's schedule?

3 A No.

4 Q Did you ever pay anybody?

5 A Nope.

6 Q Did you have authority to pay anybody?

7 A Nope.

8 Q Did you have authority to set anybody's schedule?

9 A No.

10 Q Okay.

11 A Actually there is one other thing if I can speak, there
12 were times where one of my stores was a little bit low on
13 inventory. Like we run out of fish, salmon let's say, because
14 we had a very busy day and unexpectedly we run out, I would
15 call Mike I need salmon. If you have some -- if you have a
16 little bit to spare one of my -- if I can borrow it and then I
17 will order extra for myself tomorrow and return it to you.
18 He'd say if you call the guys at the store the counterperson
19 or one of his chefs and ask him do you guys have any extra
20 fish yeah sure we'll get it ready and I would say somebody is
21 picking it up or myself. Either myself or one of the drivers
22 would pick up the fish or whatever we were low on that day.

23 And there were times that he borrowed things from
24 me. We would help each other out. We're friends. It's not
25 like you're on your own, that's it, you know.

Katanov - direct - Samuel

287

1 Q And how often -- how often would you say that it was that
2 you would borrow some food items or supplies from --

3 A He borrowed more frequently than I did because he was
4 inexperienced with the ordering and of the busy times because
5 it was a new store. So there were a lot of spikes, if you
6 know what I mean. Some days were busier unexpectedly because
7 it was something new and they didn't know how to properly
8 order. So he bought more frequently than he -- if I had to
9 guess I borrowed from him once every a few weeks, a month, if
10 any.

11 Q Did you ever order any, like, pre-made sushi platters
12 from Sushi Fussion Express?

13 A Yes, yes. There were a few times when I went to get some
14 dinner for my family and my store was further away than his
15 store, closer to my house. I lived on Main Street so I would
16 call him or his store and place an order and go pick up the
17 platter myself and most of the time he would deduct it from my
18 royalty check.

19 Q Okay.

20 A Also one other reason -- I could have really had my guys
21 to my house from my Forest Hills location, but he was new so I
22 wanted to support him so that's why I ordered from his store
23 as opposed to mine.

24 Q Did you have an accountant for your financial records for
25 Sushi Fussion LLC?

Katanov - direct - Samuel

288

1 A Yes, I still do.

2 Q Who is your accountant?

3 A Ben Malakh.

4 Q And do you know if Michael Yagudaev also used that same
5 accountant?

6 A He did not.

7 Q Did you ever file any joint tax returns with Michael?

8 A No.

9 Q And did you ever have a website for Sushi Fussion?

10 A Yes, we do.

11 Q And was the Sushi Fussion Express location mentioned on
12 the website?

13 A Yes, it was.

14 Q And can you tell the jury why that would be?

15 A So, we all went under the same name as Sushi Fussion.
16 That is our trademark and it still is and when he opened his
17 store, he asked me can he put his location there as well so
18 it's more convenient for the customer who puts in Sushi
19 Fussion, my location comes up as well. I said I was going to
20 charge you, but I'm not because you're already paying a
21 royalty. It's advertisement of your store and it's part of
22 that royalty fee.

23 Q And do you know if on the website it mentioned anything
24 about who owned Sushi Fussion?

25 A Yes. So, on his page, Sushi Fussion Express, the page

Katanov - direct - Samuel

289

1 that he had on my website it did mention that both Leva and
2 Michael, owners of Sushi Fussion. This is something that a
3 magazine editor, Elon Cornblum (ph) wrote --

4 MR. SCHWEITZER: Hearsay.

5 A I'm sorry? Okay, so.

6 THE COURT: Just give me one second.

7 Do you want to lay a foundation?

8 MR. SAMUEL: Well, I'm asking him? Can we get that
9 exhibit up, the website?

10 THE COURT: Sure. Do you know what exhibit it is?

11 MR. SCHWEITZER: It's Exhibit 5. Let me get it up.

12 A Do you want me to read it?

13 MR. SCHWEITZER: I ask that it be published.

14 THE COURT: I think it's up for the witness. It's
15 up to the counsel if he wants to publish it to the jury.

16 MR. SCHWEITZER: Excuse me.

17 BY MR. SAMUEL:

18 Q Mr. Katanov, do you see what's on your screen?

19 A Yes.

20 Q What is it?

21 A It's an About Us page for the Sushi Fussion Express for
22 him that was on our website.

23 Q In the middle of the page can you please read the first
24 stage?

25 A Sure: Owners Levy and Michael have set out to create a

1 truly authentic and unique sushi experience making it a goal
2 to offer over 100 rolls.

3 Q What was your understanding when it said owners Leva and
4 Michael?

5 A That each one of us owns a Sushi Fussion restaurant.

6 Q Okay. And did you and Michael Yagudaev use the same
7 menus or the same type of menus?

8 A So when he first opened up I told him you could take my
9 menu, you could create your own menu it's up to you. He
10 looked at my menu. Most of the stuff he took off of my menu
11 and he did make some new variations with new rolls that he
12 added. He had a Main Street roll that I didn't have on my
13 menu that was at the beginning and at the end he added the
14 hibachi menu which I did not have in my locations.

15 Q Okay. So were you ever in contact with Yang Yang Gao
16 after he stopped working for you?

17 A Yeah, we were like friends. He used to help me find
18 chefs from other locations. I used to text him and say,
19 Eddie, do me a favor, I need some chefs for Great Neck for
20 Manhattan. He said, sure, no problem I will help you out.
21 There were times I offered him compensation for that but he
22 said don't worry about it. He said you took care of me when I
23 was working for you. He never took a penny from me which I
24 appreciated.

25 Q Did you ever have a handbook for your store?

1 A I did not.

2 I'm sorry, if I'm a little nervous. I have never
3 done this before.

4 Q That's okay.

5 MR. SCHWEITZER: I ask that the remark be stricken.

6 THE COURT: If you would, just answer the questions.
7 That would be great and don't make remarks.

8 THE WITNESS: Sorry about that.

9 MR. SAMUEL: I will be done in one moment, Your
10 Honor. I want to look at my notes for a second.

11 BY MR. SAMUEL:

12 Q One other question; when Yang Yang Gao was working for
13 you at the glatt supermarket what was his primary duty?

14 MR. SCHWEITZER: Objection. Calls for a legal
15 conclusion.

16 THE COURT: One second.

17 Do you want to ask it a different way?

18 MR. SAMUEL: Sure.

19 Q What was Yang Yang Gao's most important function when he
20 worked for you at the supermarket?

21 A Like I said, he ran the spot and he managed it. His
22 responsibility was to make sure that the orders that came in
23 were executed properly and promptly, that we had everything we
24 needed for the store. We as my guy. He was the guy who ran
25 that spot for me.

Katanov - direct - Samuel

292

1 Q And are you able to estimate, like, what percent of his
2 time was spent managing and what percent of his time was spent
3 making sushi rolls?

4 A I would say a good 60/40 split. He was managing 40 and
5 making the sushi rolls himself.

6 Q And did he have authority to, like, reprimand the other
7 sushi chef or the counter guy or delivery guy?

8 MR. SCHWEITZER: Asked and answered.

9 MR. SAMUEL: It's a different question.

10 THE COURT: Give me a second.

11 I think the question whether he had authority over
12 the counter guy was asked and answered.

13 Do you want to rephrase your question?

14 BY MR. SAMUEL:

15 Q Did you give Yang Yang Gao authority over the delivery
16 guy?

17 A So officially I never told him that but he did have
18 authority over him.

19 Q And how do you know that?

20 A Because there were times, like I said, where the delivery
21 guy used to slack and Eddie would tell him you have to hurry
22 up, you have to do stuff.

23 MR. SCHWEITZER: Hearsay.

24 THE COURT: Overruled. It's not for the truth.

25 A Yeah, so.

Katanov - cross - Schweitzer

293

1 Q And could Eddie reprimand the counter guy?

2 MR. SCHWEITZER: Asked and answered.

3 THE COURT: Wait a second.

4 Overruled.

5 You can answer the question.

6 A Yes. He would, you know, tell him -- sometimes he
7 would -- we would get very busy, to stop taking orders we have
8 to catch up with what we have right now and I would give him
9 that power to do because I know that he knows if we need to
10 keep taking orders or stop taking orders. We obviously didn't
11 want to overwhelm him with orders so his credibility wouldn't
12 go down, so I let him do it.

13 Q Okay. And did any employees ever work for you and for
14 Michael, like, at the same time but at different locations?

15 A No.

16 Q Okay. Did you ever tell any of your employees to go work
17 for any of Michael Yagudaev's stores?

18 A No.

19 MR. SAMUEL: I have nothing further.

20 THE COURT: Cross.

21 CROSS-EXAMINATION

22 BY MR. SCHWEITZER:

23 Q You said just a moment ago that you were familiar with
24 Wei Gao; correct?

25 A Correct.

1 Q Do you recall being deposed in this matter?

2 A I'm sorry?

3 Q Do you recall being deposed in this matter?

4 A Yes, I do.

5 Q Do you recall at your deposition being asked the
6 following question and giving the following answer, page 91
7 lines 21 through 23:

8 "Question: Are you familiar with a person named Wei
9 Gao?

10 "Answer: No."

11 A I remember that. I the reason I said that because he was
12 not present and I did not recognize the name. They all went
13 by English name and since I didn't write out the checks I
14 didn't know their Chinese names.

15 MR. SCHWEITZER: I ask that the nonresponsive
16 portion of the answer be stricken.

17 MR. SAMUEL: I think it was responsive.

18 THE COURT: So I will strike the answer beyond "No."
19 Your attorney is listening to everything and will
20 have the opportunity to ask something if he wants to clarify.

21 THE WITNESS: I wanted to explain myself.

22 BY MR. SCHWEITZER:

23 Q You also testified that you were familiar with Charles
24 Chipengule; correct?

25 A Correct.

1 Q Do you recall being asked the following question and
2 giving the following answer in your deposition at page 91,
3 line 24:

4 "Question: Are you familiar with a person names
5 Charles Chipengule?

6 "Answer: No."

7 A The same answer. I did not recognize the name because
8 now that he is in the courtroom, I recognize him.

9 MR. SCHWEITZER: I ask that the nonresponsive
10 portion be stricken.

11 THE COURT: Overruled.

12 BY MR. SCHWEITZER:

13 Q You said that the Main glatt kiosk opened in August of
14 2011; correct?

15 A Around, yes.

16 Q And you said that Yang Yang Gao was hired in August of
17 2011; correct?

18 A I did not say that.

19 Q When was Yang Yang Gao hired?

20 A It was either end of September or middle of September or
21 it could be early August, but approximately that time.

22 Q Would it be fair to say that the main glatt kiosk opened
23 slightly before Yang Yang Gao was hired?

24 A No.

25 Q Now if Yang Yang Gao was hired in September and the main

1 glatt kiosk opened in August, wouldn't it be fair to say that
2 the main glatt kiosk was opened before the Yang Yang Gao was
3 hired?

4 A It was not opened.

5 Q When you said it opened in August of 2011 that was not
6 true?

7 A I said about August. I do remember that it was September
8 that we opened and I hired him in August. I'm sorry, it's too
9 many dates in my head and too many locations, thank God.

10 Q You said that Yang Yang Gao spent the first month of his
11 employment training at Sushi Fussion in Forest Hills; correct?

12 A Correct.

13 Q And you said that his salary at that time was 750 per
14 week; correct?

15 A Correct.

16 Q Is that the standard starting salary for sushi chefs?

17 A It was at that time.

18 Q No starting sushi chef made more than 750; correct?

19 A As far as I remember; correct.

20 Q And Yang Yang Gao didn't manage the sushi bar at Forest
21 Hills, did he?

22 A He did not.

23 Q Are you familiar with a person named Ray?

24 A Of course.

25 Q Who is Ray?

1 A Ray was a chef that took over for another chef that I had
2 there who started with me from the first day. His name was
3 Danny.

4 Q Was Ray a manager at Sushi Fussion Forest Hills?

5 A He was the head chef at Sushi Fussion Forest Hills.

6 Q Was he a manager?

7 A He was not.

8 Q And Ray's duties at Sushi Fussion Forest Hills were
9 making sushi and occasionally asking for -- asking around if
10 people would be interested in working; correct?

11 A His responsibilities were making sushi, ordering all the
12 supplies that we needed the next day, making orders, taking
13 inventory and also is making sure that it would run smoothly
14 but I wasn't at the location and I wasn't the managing person.

15 Q You described Ray's duties very similar to Yang Yang
16 Gao's duties, but you said that Ray was not a manager;
17 correct?

18 A Correct.

19 Q And you said that was true because you were constantly
20 present at the Forest Hills location?

21 A Correct.

22 Q Isn't it true that Robert was constantly present at the
23 glatt supermarket location?

24 A That's not true.

25 Q How do you know that?

1 A Because he's my partner and I know where he was at all
2 times. He ran that spot, meaning he was responsible for that
3 spot and he would not stay there all day. He would pop in and
4 out. We shared an office downstairs with the supermarket
5 owner. We spent a lot of time there doing stuff. He would go
6 out and try to look for more business. He would try to get
7 accounts. We had a Queens College account that we made sushi
8 for every day. We would go to different supermarkets and see
9 if we could find an account and supply sushi and make more
10 money.

11 Q So on a regular basis Robert would spend most of his time
12 in the glatt kiosk or in the office below the kiosk?

13 A No he would not spend most of his days in the kiosk. He
14 would be in and out or in the office or trying to find more
15 business.

16 MR. SCHWEITZER: Your Honor, please direct the
17 witness to respond to my question as I asked it.

18 A I did respond to the question as you asked.

19 THE COURT: Let me respond to the objection. I
20 think he responded. Ask a question.

21 BY MR. SCHWEITZER:

22 Q So, again my question was did Robert spend most of his
23 time, one, at the glatt kiosk and, two, at the office in the
24 basement under the glatt kiosk?

25 A No.

1 MR. SAMUEL: Objection, compound question.

2 THE COURT: I don't understand the question. Can
3 you rephrase it?

4 BY MR. SCHWEITZER:

5 Q Did Robert spend most of his time in the basement under
6 the glatt kiosk from which he would sometimes go up to the
7 glatt kiosk?

8 MR. SAMUEL: Asked and answered.

9 THE COURT: Give me a second.

10 All right. I will let him answer it.

11 You can answer.

12 Overruled.

13 THE WITNESS: It's not a yes or no answer. Can I
14 explain?

15 THE COURT: Sure.

16 A So, again, Robert did not only stay in the kiosk or the
17 office downstairs. He would be in and out of the store. He
18 would try to find new business and he would be downstairs and
19 once in a while he would go up and check on the operation at
20 the kiosk.

21 Q So, in other words, you said you knew where he was at all
22 times. My question is did he spend most of his time somewhere
23 in the supermarket?

24 A Not most of the time, no.

25 Q Where did he spend most of his time?

Katanov - cross - Schweitzer

300

1 A Outside of the supermarket.

2 Q What was the proportion?

3 A I would say he would spend about maybe 20 30 percent of
4 his time in the supermarket and the rest out.

5 Q Okay. And how much of your time did you spend in the
6 Forest Hills location in 2011 through 2013?

7 A So when we opened in 2011 I was there for the first, I
8 would say, good six months until we opened the kiosk in the
9 supermarket and then after that we opened another location in
10 Great Neck, six months later in April of 2012 and I went over
11 there and managed that location.

12 Q Again, how much of your time between 2011 and 2013 did
13 you spend at the Forest Hills location in particular?

14 A Like I said, the first six months I was there every day
15 and after that I was not there every day. I would just pop in
16 and out.

17 Q So after the first six months in terms of a proportion
18 how much time did you spend there?

19 A Percentagewise?

20 Q Percentagewise.

21 A I would pop in once in two days, sometimes twice a week.

22 Q And how long would you stay?

23 A How long would I stay at the location?

24 Q Yes.

25 A It depends on what I have to do that day, if I need to do

Katanov - cross - Schweitzer

301

1 some paperwork or speak to the managers or speak to the chefs,
2 it could be ten or fifteen minutes or an hour at times.

3 Q And after the first six months when you stopped being at
4 the glatt -- sorry at the Forest Hills location all of the
5 time, Ray still didn't become a manager, did he?

6 A No, Ray would never be a manager in the Forest Hills
7 location because it was a standalone restaurant.

8 Q Ray would never be a manager at the Forest Hills location
9 even if his duties were similar to Yang Yang Gao's at the
10 kiosk?

11 A Right, because it was a bigger store and he had to -- he
12 needed help to watch over everything.

13 Q When who decided that Yang Yang Gao would be working at
14 the kiosk?

15 A Me and my partners.

16 Q And who told Yang Yang Gao that he would be working at
17 the kiosk?

18 A Me and my partner.

19 Q All three of you?

20 A Who spoke to him?

21 Q Yes.

22 A I did.

23 Q Did he ask you for a raise at that time?

24 A If I recall correctly we told him that once the
25 supermarket would open and he's going to run it, he's going to

Katanov - cross - Schweitzer

302

1 get a raise to 850 meaning \$100 more than he got when he was
2 training at the Forest Hills location.

3 Q So did he ask for a raise?

4 A No, he didn't.

5 Q Between you and your partners whose idea was it to give
6 him a raise?

7 A It was combined.

8 Q Who had the idea first?

9 A Who had the idea first? We all made a unanimous
10 decision.

11 Q Who proposed the decision?

12 A It was just the way we did things; employees that have
13 more experience should be compensated more.

14 Q Was Ray compensated more than other employees?

15 A Of course.

16 Q How much?

17 A He got also \$100 more a week than the others.

18 Q You said he was not the manager?

19 A He was not the manager. He was the head chef.

20 Q Over the course of two years isn't it true that there
21 were only three sushi chefs hired after Yang Yang Gao?

22 A Can you repeat that, please?

23 Q After Yang Yang Gao was hired, over the course of three
24 years at the glatt kiosk -- over the course of two years at
25 the glatt kiosk there were only three other sushi chefs hired;

1 correct?

2 A I will be honest with you we hired and fired so many
3 chefs in the past eleven years, it's just -- I don't remember.

4 Q So you don't remember how many sushi chefs were hired to
5 work at the glatt kiosk between 2011 and 2013?

6 A So we always had two chefs at that location. How many we
7 changed during those two years, I don't know.

8 Q And you don't have any records reflecting those who
9 worked there; correct?

10 A I do not.

11 Q In fact -- withdrawn. In fact, you kept records for
12 employees' time at the glatt supermarket but you destroyed
13 them, didn't you?

14 A I didn't destroy them. I just didn't think it was
15 necessary for me to keep them. Yeah, you could say I threw
16 them out because the supermarket closed. I thought that that
17 was the end of that chapter.

18 Q Are you familiar with the provisions of the Fair Labor
19 Standards Act?

20 A I am now.

21 Q When did you become familiar with them?

22 A You can say it was 2016, 2017.

23 Q You said you had an accountant; right?

24 A I still do.

25 Q Did the accountant give you any information regarding the

Katanov - cross - Schweitzer

304

1 minimum wage or payment of over time under the Fair Labor
2 Standards Act?

3 A He did not.

4 Q Did the accountant give you any information regarding the
5 payment of minimum wage or overtime under the New York Labor
6 Law?

7 A He did not.

8 Q Are you familiar with the Fair Labor Standards Act and
9 New York Labor Law's notice posting requirements?

10 A I am now, yes.

11 Q When did you become familiar with them?

12 A Around the same time, 2016, 2017.

13 Q Was that after you were sued?

14 A Was that after we were sued -- what are you talking
15 about? This lawsuit?

16 Q Was that after the commencement of this lawsuit that you
17 became aware of those provisions?

18 A It could be.

19 Q To your knowledge, were any of your partners so aware of
20 those provisions?

21 A I can't hear you.

22 Q To your knowledge were any of your partners aware of
23 those provisions?

24 A When were they aware, before or after?

25 Q Before.

1 A No, they were not.

2 Q How do you know that?

3 A Because I do the paperwork at my company, at our company.

4 MR. SCHWEITZER: Can we screen share with the
5 witness?

6 (Exhibit published.)

7 Q I am showing you Exhibit 1. Do you recognize this
8 document?

9 A Do I recognize it, no. Actually this is Michael's
10 handbook that he implemented at his location.

11 Q When did he implement it at his location?

12 MR. SAMUEL: Objection -- I'm not sure how this
13 witness --

14 THE COURT: If you know, you can answer the
15 question.

16 A I don't remember.

17 Q To your knowledge what prompted him to do that?

18 MR. SAMUEL: Objection. How would he know?

19 MR. SCHWEITZER: If he doesn't know, he can say --

20 A I can answer. He had a consultant that approached him
21 one day and tried to educate him as to how to comply, I guess,
22 with the law and labor and all of that stuff, what prompted
23 that, I don't know.

24 Q Who was the consultant?

25 A I don't remember his name now.

Katanov - cross - Schweitzer

306

1 Q Have you ever communicated with that consultant?

2 A No.

3 Q Did you ever have any part in drafting this handbook?

4 A Nope.

5 Q You said that the ordering at the kiosk worked at

6 follows: A customer would place an order with the

7 counterperson the counterperson would print out the ticket,

8 the ticket would be given to the sushi chefs, the sushi chefs

9 would make their rolls and the rolls would be deposited at a

10 station to be packed; correct?

11 A Correct.

12 Q And you also said that managing the delivery guy would

13 consist of placing the rolls in the area to be packed;

14 correct?

15 A I did not say that exactly.

16 Q The record will reflect what it reflects.

17 A It's along those lines.

18 Q There's no question before you, sir.

19 THE COURT: Let's not have comments. Let's just

20 have questions.

21 Q You also said on direct that the counterperson, Albert,

22 would listen to Yang Yang Gao, but you also said that you

23 didn't instruct Albert to listen to Yang Yang Gao; correct?

24 A Correct.

25 Q How often were you at the kiosk?

Katanov - cross - Schweitzer

307

1 A So, when it first opened in September I was there the
2 first six months and I did basically what Robert did when he
3 came in 6 months later. I was in and out, you know, trying to
4 find new business. I was in the office. I was upstairs and
5 downstairs. I was more often there than Robert there. Robert
6 came six months later and it was more established, the kiosk.

7 Q So in the first six months the kiosk needed more
8 oversight than it needed later on; correct?

9 A Correct.

10 Q And you provided that oversight?

11 A Yes.

12 Q As a proportion of your time over the first six months of
13 its operation how much -- how much of your time did you spend
14 at the kiosk?

15 A I would say in the beginning, it -- I would say most of
16 the time I was at the kiosk.

17 Q And not at Forest Hills?

18 A No. My partner Isaac took over that location.

19 Q I see. So were you there 100 percent of the time, 90,
20 80, 70 or something --

21 A I was there more than Robert. I was there I would say 30
22 to 40 percent of the time.

23 Q Okay. You were there more than Robert but nowhere near
24 100 percent of the time?

25 A No, I didn't need to be.

1 Q And you don't have personal knowledge of everything that
2 happened at the kiosk for the first six months, do you?

3 A I'm sorry, repeat that.

4 Q You don't have personal knowledge of everything that
5 happened at the kiosk for the first six months, do you?

6 A Not 100 percent of the stuff, but I have a good idea.

7 Q And you didn't observe all of Yang Yang Gao's arrival
8 times, leaving times, break times; correct?

9 A No, the counterperson would tell me. He would tell me
10 what time everybody came in and if there's anything I need to
11 know I was told by him.

12 Q So the counterperson would keep track of the employees'
13 working times; correct?

14 A Not really. He would only tell me things out of the
15 blue, that somebody came in late or there was, like, a fight
16 or we had a fight once with the chef.

17 Q But it would be the counterperson who told you these
18 things; right?

19 A So it depends on who messed up. You know, if it was the
20 chefs, the chef wouldn't tell me that he messed up. The
21 counterperson would tell me that. If it was the
22 counterperson, then Eddie would tell me that he's slacking
23 off. If it's the delivery guy, they both could have told me
24 at times but it was mostly Eddie.

25 Q So the counterperson would report on the sushi chefs to

1 you, the sushi chefs would report on the counterperson and
2 everybody would report on the delivery guy; right?

3 A Pretty much.

4 Q There was no person who was above or being reported on?

5 A I didn't understand that.

6 Q There was no person who was exempt from being reported
7 on, was there?

8 A No.

9 Q You described the decisionmaking process for who would
10 make rolls at the kiosk location, that if Yang Yang Gao was
11 not busy he would make the roll and if he was busy doing
12 something else the other sushi chef would make the roll; is
13 that correct?

14 A It was his decision.

15 Q That's a heuristic, right; it doesn't require any
16 independent judgment?

17 A Excuse me?

18 Q That's a heuristic; right?

19 A What's a heuristic?

20 Q Like a default model for making a decision.

21 MR. SAMUEL: Objection to the form. I think it's a
22 confusing question.

23 THE COURT: Can you rephrase the question? I don't
24 understand the question?

25 BY MR. SCHWEITZER:

1 Q It would always be the case that if Yang Yang Gao was
2 busy, he wouldn't make the roll and if he wasn't busy he
3 would, right?

4 A No, that's not the case.

5 Q Well, that's how you described it; right?

6 A I described it that way because that's the way it was
7 done at times but it was up to him totally as to who does the
8 rolls.

9 Q And he would make that decision based on whether he was
10 busy or not, right?

11 A It depends on that, on his mood, on the day, on the site
12 what he had to do, different factors.

13 Q But he had to do side work?

14 A Well, yeah. How else are you going to make sushi? You
15 have to make the rice, cut the cucumbers, slice the fish, of
16 course. There was a lot of side work to be done and they had
17 a system.

18 Q Isn't it true that Yang Yang Gao spent by far the vast
19 majority of his time either doing side work or making the
20 rolls directly?

21 A No.

22 Q You said that he spent about 40 percent of his time
23 making rolls. That did not include side work, did it?

24 A It did.

25 Q But you differentiated between making rolls and doing

1 side work now?

2 A They have a system as to who does the side work and who
3 does the rolls. In the morning they would come in. One of
4 the chefs would cut up the fish, do the side work and the
5 other would do the orders if they have. If they didn't have
6 orders they would both do the side work. So when I say 40
7 percent, I am including the side work with making the rolls.

8 Q What, according to you, did Yang Yang Gao fill the
9 remaining 60 percent of his time with, if not making rolls or
10 making ingredients?

11 A He would oversee the operations.

12 Q By overseeing, stand by and do nothing?

13 A No, no. Taking inventory, making sure the showcase that
14 was filled up that was in front of the counter looked good.
15 Make sure that the fish is fresh. He also to make sure that
16 the rice, the HP level was at a certain temperature. There's
17 a lot of little factors that he had to make sure were complied
18 also with the Health Department.

19

20 (Continued on the following page.)

21

22

23

24

25

Katanov - cross - Schweitzer

312

1 BY MR. SCHWEITZER: (Continuing)

2 Q And according to you, that added up to 60 percent of his
3 time?

4 A Pretty much.

5 Q There wasn't a time recording system in the kiosk, was
6 there?

7 A No.

8 Q And you said that Yang Yang Gao earned a salary of \$850
9 per week, right?

10 A Correct.

11 Q Were sushi chefs subject to having a salary reduced if
12 they missed a day?

13 A Yes.

14 MR. SCHWEITZER: I'm going to show the witness
15 Exhibit Number 11 that's already been admitted and ask that it
16 be published to the jury.

17 Q I'm showing you, sir, what's been admitted as Plaintiffs'
18 Exhibit 11. This is marked Sushi Fussion, LLC payroll
19 summary. Do you see that?

20 A Yes.

21 Q Did you create this document?

22 A Yes, I did.

23 Q And this document records Yang Yang Gao's salary payments
24 between October 2011 and October 2013, correct?

25 A Correct.

Katanov - cross - Schweitzer

313

1 Q Yang Yang Gao was hired in August of 2011, correct?

2 A Yang Yang Gao was hired August 11th, correct.

3 Q And this document omits any record of any salary payments
4 to him between August and October, correct?

5 A Correct.

6 Q This document also records that he was only paid \$300
7 every two weeks, correct?

8 A Yes, because he was getting a check every other week.

9 Q No. This document only records the portion of his salary
10 that was paid by check, correct?

11 A Correct.

12 Q And there is a column "Taxes withheld." Those are the
13 taxes withheld from the check amount, correct?

14 A Correct.

15 Q Not the taxes withheld from the total salary amount,
16 correct?

17 A Correct.

18 Q And the "hours" column here records that Mr. Gao worked
19 exactly 40 hours every two weeks throughout his employment,
20 correct?

21 A That was the default setting in the payroll system. I
22 just never changed it. I mean to change it but, yes, that was
23 the hours in here.

24 Q So you did not keep a record of Yang Yang Gao's hours and
25 days worked?

1 A I did not do that.

2 Q If you didn't know better than to keep a record of hours
3 worked, why is there an "hours" column in the document?

4 A Like I said, it's a default setting and the payroll
5 system which was already checked off so I didn't even know to
6 change it or to uncheck it so I left it the way it was.

7 Q What's the system you're referring to?

8 A Intuit.

9 Q Intuit QuickBooks?

10 A Yes.

11 Q How did you obtain Intuit QuickBooks?

12 A My accountant gave it to me.

13 Q And the accountant gave it to you for the purposes of
14 preparing payroll, correct?

15 A Correct.

16 Q And keeping an accurate record of payroll for taxes,
17 correct?

18 A Correct.

19 Q And you, in fact, inputted an inaccurate amount of pay
20 for Mr. Gao's salary, correct?

21 MR. SAMUEL: Note my objection.

22 A Incorrect.

23 Q Well, this \$300 is only part of his salary, correct?

24 A Yes. The part that was by check, that's the part I input
25 in the system.

Katanov - cross - Schweitzer

315

1 Q And you believe you didn't have to pay tax on the part
2 that was paid by cash?

3 A Sorry. I didn't understand that.

4 Q You didn't believe you had to record the part that was
5 paid by cash?

6 A No, I didn't.

7 Q And you didn't believe you had to pay payroll tax on the
8 part of the payment that was paid by cash?

9 A I didn't.

10 Q You say again you had an accountant. The accountant
11 never called you on this?

12 A No. I guess I didn't tell him.

13 Q Well, you gave the accountant the payroll information
14 that you input into here, correct?

15 A I didn't know to tell him about the cash payment that was
16 made to the employees. I only thought I had to tell him
17 whatever I was giving a check on.

18 Q Well, you gave the accountant this information though,
19 didn't you?

20 A I'm sorry?

21 Q You gave the accountant the information in the document,
22 didn't you?

23 A Yes. He asked me how much are you giving him.

24 Q So he asked you how much are you giving him and you told
25 him with respect to Yang Yang Gao \$300?

CMH

OCR

RDR

FCRR

Katanov - cross - Schweitzer

316

1 A Yeah.

2 Q So you lied to your accountant?

3 A No.

4 MR. SAMUEL: Objection.

5 A I didn't.

6 Q You omitted information when you were talking to your
7 accountant?

8 A I did not know that I had to include cash payments into
9 the payroll system.

10 Q When your accountant asked you directly how much are you
11 paying Yang Yang Gao --

12 A He did not ask me how much I paid Yang Yang Gao. He
13 asked how much I give him in a check and I told him \$300 every
14 other week like it was requested by Yang Yang Gao.

15 Q You did not infer from the existence of an "hours" field
16 that there should be time recording?

17 A Can you repeat that, please?

18 Q Did you not infer from the existence of an "hours" field
19 that there should be time recorded?

20 MR. SAMUEL: Note my objection. I don't know what
21 he means, "should be time recorded."

22 MR. SCHWEITZER: That the employee's time should be
23 recorded.

24 A No, I didn't.

25 Q And you did not make a record of Yang Yang Gao's arrival

1 times, leaving times, break times or days worked, did you?

2 A I didn't.

3 Q You testified a moment ago that both Yang Yang Gao and
4 Albert went from the supermarket to work at Sushi Fussion
5 Express, didn't you?

6 A No. I said they were both hired by Michael to work at
7 Michael's location.

8 Q Putting that aside, they worked for some time at Sushi
9 Fussion Express -- I'm sorry -- they worked at some time for
10 the kiosk and then sometime later, they worked for Sushi
11 Fussion Express, correct?

12 A No. They were -- I'm sorry. I'm looking for the right
13 word to say. They were basically done working at the Sushi
14 Fussion kiosk because it closed down and then Michael hired
15 them to work at his location, Sushi Fussion Express.

16 Q So there was a period of time when both Yang Yang Gao and
17 Albert were working at Sushi Fussion kiosk in the supermarket
18 and there was another period of time when they were working at
19 Sushi Fussion Express?

20 A Oh, yes, you're right.

21 Q Do you recall that your -- excuse me.

22 Do you recall at your deposition being asked the
23 following question and giving the following answer?

24 Page 44, line 11: Did any employees besides Eddie,
25 Yang Yang Gao, go to work from 6938 Main Street to Sushi

1 Fussion Express?

2 Answer: No.

3 A I recall saying that. At that time, I did not remember
4 and throughout this trial, it was mentioned that Albert also
5 went and then I remembered, yes, Albert did go with him.

6 Q That was mentioned by Yang Yang Gao. Are you saying that
7 his testimony was truthful in that regard?

8 A In that regard, yes.

9 Q Did you ever have posters from the Department of Labor
10 talking about minimum wage and overtime posted at Forest
11 Hills?

12 A When I learned about it, I did post them. I'm sorry.
13 You said Forest Hills and --

14 Q Forest Hills.

15 A Yes.

16 Q Okay.

17 A This was after 2016, 2017 when I learned about it, not at
18 the beginning.

19 Q Okay. Now, you say that Sushi Fussion Express Inc. paid
20 5 percent royalty to use the name and trademark Sushi Fussion
21 and to appear on the Sushi Fussion website, correct?

22 A Correct.

23 Q To what person or entity was that payment made?

24 A Sushi Fussion, LLC.

25 Q And you don't have records of those payments being made,

Katanov - cross - Schweitzer

319

1 do you?

2 A Not anymore.

3 Q And you don't have records of when they stopped, do you?

4 A No.

5 Q Was the agreement between Sushi Fussion Express Inc. And
6 Sushi Fussion, LLC for rights reduced to a writing?

7 A No, it was orally.

8 Q You testified -- excuse me. You testified a moment ago
9 that no employees went from Sushi Fussion Express to work at
10 any of your locations, correct?

11 A I said -- one more time, sir? Repeat the question. I'm
12 confused.

13 Q No employees went from Sushi Fussion Express to work at
14 any of your locations, correct?

15 A There actually was one employee that went from, that was
16 hired by my company, by Sushi Fussion, LLC, that used to work
17 for Michael's company.

18 Q That would be Zhedong Li?

19 A Correct.

20 Q And he went to work from Sushi Fussion Express to
21 224 West 35th Street, correct?

22 A So what happened was before Michael opened his store, we
23 had another supermarket that Li Zhedong worked at and after a
24 few months, it wasn't doing so well so we decided just to fill
25 up the showcase from our Forest Hills location and take away

CMH

OCR

RDR

FCRR

Katanov - cross - Schweitzer

320

1 the chef from there. At that time, Michael needed a chef so I
2 told him, Listen, I have a chef, I don't need him anymore, if
3 you want to speak to him, offer him a job, he might come to
4 you. Michael called Li Zhedong and they made an agreement and
5 they came to terms and he went to work for him.

6 Then later on after some time that he worked over
7 there, I was opening my 224 West 35th Street location and I
8 needed a chef and Michael had another chef that used to work,
9 meaning he had an extra chef and I told him, Listen, if you
10 can give me Li so I can put him in the location that's new
11 because he already knows our menu, it will help me. He said,
12 Listen, you know what, I can find a cover for him, if he wants
13 to go back to you, I don't mind.

14 So I spoke to Li. I said, Listen, you know, I'm
15 opening a location in Manhattan and it would be a little bit
16 of a commute for you, I'm willing to compensate you and I need
17 your help over there. He agreed, I hired him back and he
18 worked at the 224 West 35th Street location.

19 Q Are you familiar with an employee named Summer, a sushi
20 chef?

21 A Yes, I am.

22 Q Did Summer work for you?

23 A Yes, he did.

24 Q How did Summer come to work for you?

25 A So he started working for Michael. I don't remember how

Katanov - cross - Schweitzer

321

1 long, maybe a few days a week. And I was also looking for a
2 chef at that time for my Great Neck location, 613 Middle Neck
3 Road, and I told Michael, I said: Listen, I'm looking for a
4 chef, do you know anybody. He said: I have a guy here that
5 I'm not too crazy about; if you want, if he's willing to
6 travel to you, you know, to your location, you can take him,
7 I'll find somebody else. So I said: All right, let me speak
8 to him. I called him up, spoke to him, come to terms, and I
9 hired him and he came to work for me in Great Neck.

10 Q Isn't it true that you asked Yang Yang Gao to find people
11 to work for you in Great Neck?

12 A Yes, I did also.

13 Q And is that about when you hired Summer?

14 A It could be, yes.

15 Q Have you ever described your Sushi Fussion locations with
16 one company?

17 A I'm sorry. Can you repeat that?

18 Q Have you ever described your Sushi Fussion locations as
19 one company?

20 A Describe to who?

21 Q To anyone in the world.

22 A I described Sushi Fussion as one company and I describe
23 it as a chain of restaurants most of the time, almost all the
24 time.

25 Q Let me see if we can refresh your recollection.

1 A Sure.

2 Q Do you recall being asked the following question at
3 deposition and giving the following answer.

4 MR. SAMUEL: What page?

5 MR. SCHWEITZER: I'm just getting to that.

6 Q This is not a single question and answer. This is a set
7 of questions and answers. I apologize. It's beginning
8 page 51, line 9.

9 Were employees of the entities Sushi Fussion, LLC,
10 Sushi Fussion of 47th street, Sushi Fussion of Forest Hills
11 and Sushi Fussion of NYC, could they be transferred between
12 locations?

13 Answer: Who, the employees?

14 Question: Yes.

15 Answer: Yes, they can, of course.

16 Question: On what basis?

17 Answer: What does that mean?

18 Question: Why would they be transferred between
19 locations?

20 Answer: If one of the chefs in one location did not
21 come out for one day, if he was sick, and then if I had, you
22 know, an extra chef in the other location, he would go to the
23 other location. It's one company.

24 Question: So based on need?

25 Answer: Yeah.

Sidebar

323

1 MR. SAMUEL: So, Your Honor, if I can object to
2 that.

3 THE COURT: Let's do it at sidebar.
4 (The following occurred at sidebar.)

5 MR. SAMUEL: That's a misleading question. He's
6 asking if, if Levi can transfer the workers among his own
7 locations.

8 THE COURT: So he says that in connection with this
9 one company, right? Is that what you're getting to, what
10 you're thinking is inconsistent or what?

11 MR. SCHWEITZER: I was more going to refresh his
12 recollection because he wasn't sure that he had ever described
13 it as one company.

14 MR. SAMUEL: No, no, no, but the question -- he
15 mentioned Levi's restaurants. He didn't mention Michael's
16 restaurant.

17 MR. SCHWEITZER: It's not offered for the purpose of
18 anything with Michael's restaurants. I'm only going for joint
19 operation between the Katanov restaurants.

20 MR. SAMUEL: Right, but that doesn't speak to the
21 question.

22 You want me to get the transcript.

23 THE COURT: I want to look back.

24 (Pause.)

25 THE COURT: Just to be clear, I think the question I

1 have Mr. Schweitzer was asking is have you ever described your
2 Sushi Fussion as one company.

3 MR. SAMUEL: Right. I think he's trying to explain
4 to the jury that they're all one company, but if you take a
5 look at this question: Were the employees of the entities you
6 owned, Sushi Fussion, LLC, Sushi Fussion of 47th Street, these
7 are all Levi's entities --

8 MR. SCHWEITZER: My question was not directed beyond
9 that.

10 THE COURT: You've got to stop.

11 MR. SAMUEL: He's not refreshing his recollection
12 because it's a different question that he asked. He asked if
13 they're all --

14 MR. SCHWEITZER: I did not ask if they were all. I
15 asked if he had described his companies as one company.

16 MR. SAMUEL: This is what he's trying to read from.
17 The question was: Did you ever --

18 THE COURT: And then here, right, he says one
19 company.

20 MR. SAMUEL: Right, but these are one company.

21 THE COURT: I'm sorry. His question is have you
22 ever described your sushi locations. So this is something
23 other than your sushi locations.

24 MR. SAMUEL: But I think he's trying to imply
25 they're all one company.

Sidebar

325

1 THE COURT: Meaning the Yagudaev --

2 MR. SAMUEL: That's correct.

3 THE COURT: That's not the question.

4 So go ahead.

5 (Sidebar conference ends.)

6 (Continued on next page.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: You can answer the question if you
2 remember it or we can read back the question.

3 THE WITNESS: I remember, yes.

4 A Yes, I did say that in my deposition. What I meant was
5 exactly what I said which is I can ask one of my chefs at any
6 one of my locations to come cover a different chef at any one
7 of my other locations at any given time aside from Michael's
8 location which was not mine, if that's what you're referring
9 to.

10 Q And while Mr. Gao was working at the Glatt Kosher
11 Supermarket, you did ask him to work in Great Neck?

12 A Which Gao? Yang Yang Gao or Wei Gao?

13 Q Yang Yang Gow, the only one who worked at the Glatt
14 Kosher Supermarket.

15 A Okay. When he was working at the Sushi Fussion at the
16 kiosk, I was opening in April, like I said, I was opening
17 Great Neck location and at the grand opening week, I needed
18 help. I did ask Eddie to come help me over there while he was
19 working for me at the main supermarket and he did come help me
20 that week.

21 Q And Eddie didn't act as the manager at the Great Neck
22 location?

23 A No, I was there.

24 Q Did you ever offer Wei Gao an opportunity to work at the
25 Great Neck location?

1 A Never.

2 Q Did Michael pay you to give advice to his employees about
3 cleanliness or about how to cut sweet potatoes?

4 A That was all part of that 5 percent.

5 Q That 5 percent was given to Sushi Fussion, LLC, right?

6 A Like you asked me before, correct.

7 Q And the revenue of that LLC would be split among the
8 partners, correct?

9 A Correct.

10 Q According to the LLC management agreement, correct?

11 A Correct.

12 Q And that LLC management agreement didn't make any
13 provision for how the 5 percent was to be split among the
14 partners; it was just split according to the general
15 management agreement, correct?

16 A Correct, it was considered income.

17 Q So you didn't get any special payment for yourself for
18 coming to Michael's restaurant and giving them advice?

19 A No, it was my duty.

20 Q That was your duty? What duty did you have?

21 A It was my duty to provide what Michael needed to run his
22 spot, that included that 5 percent which is pop in once in a
23 while, you know, to say hello, to look over the place when I
24 came to pick up the check, to put, you know, his location on
25 the website. I ran the website as well. That's it. And I

1 deposited the checks, usually when Michael paid me, I
2 deposited it in the bank in the Sushi Fussion, LLC account.

3 Q And you said Michael stopped paying you after about six
4 months, correct?

5 A Correct.

6 Q And despite that, did you still continue doing your duty
7 and going to his restaurant and giving advice?

8 A No. After that, I would just come in once in a blue, if
9 I, you know, if I wanted to get some sushi from him or just to
10 say hi, but I wouldn't really walk in, walk through like I did
11 diligently when I would come in when he did pay us.

12 Q And you also received materials from Michaels after six
13 months, correct?

14 A We used to borrow each other materials or return or pay
15 for them, but we never took them without returning.

16 Q So what you said was you would buy extra from a vendor
17 and return what you had taken, right?

18 A Yes. Let's say I borrow salmon from him, right, tomorrow
19 I order whatever I borrowed from him and whatever else I need
20 for my store and then once I get it, I have somebody drop it
21 off to the store to return it.

22 Q But you didn't pay Michael money directly for the items
23 that were taken, correct?

24 A Usually we never paid for our things that we borrowed
25 because it was always available. Once in a blue, there might

Katanov - cross - Schweitzer

329

1 have been an item that was discontinued so we couldn't return
2 to each other. Then we found the invoice and we paid for it.
3 It was taken off from the royalty check.

4 Q But the usual practice was just to --

5 A Yes.

6 Q -- to not pay but return the items?

7 A Exactly.

8 Q And that was Michael's practice when he borrowed from you
9 as well?

10 A Exactly.

11 Q You said you managed the website, correct?

12 A Well, yeah. I had an IT person who did the website for
13 us but I was the one giving him the information.

14 Q You decided what to put on the website, correct?

15 A No. We decided as a partnership what to put on the
16 website but I was the one that was in direct contact with the
17 IT person.

18 Q You and Isaac and Robert all agreed -- hang on a second.
19 Withdrawn.

20 MR. SCHWEITZER: I'm screen-sharing an exhibit and
21 I'd ask that it be published to the jury.

22 THE COURT: I see we're around 11:30. How long do
23 you think you have with this witness?

24 MR. SCHWEITZER: Maybe five minutes.

25 THE COURT: Okay.

Katanov - cross - Schweitzer

330

1 MR. SCHWEITZER: This is Exhibit 5.

2 Q Showing you part of page 5 of Exhibit 5, this is
3 referring to Sushi Fussion Express, correct?

4 A Correct.

5 Q And you testified earlier that this portion of the
6 website said, "Owners Levi and Michael have set out to,"
7 et cetera, correct?

8 A Yes.

9 Q And was that text decided on -- withdrawn.

10 Was posting that particular text decided on by you,
11 among your partners, between you and Michael?

12 A So as I was speaking to my lawyer on how this text came
13 about, I have told them and I will tell you the story.

14 We had a magazine editor, Elan Kornblum. He had the
15 kosher, Great Kosher Restaurants Magazine. So he added an
16 article about this location when it first opened, the Sushi
17 Fussion Express, and this was the text that he put in there
18 and I liked the way it sounded. I told my partners, I said
19 this sounds good, nothing wrong with it, so I sent it to the
20 IT guy and he posted it up.

21 Q I'm showing you the page 3 of the website. This is
22 referring to Sushi Fussion Forest Hills, correct?

23 A Right.

24 Q There's nothing about any owners here, correct?

25 A Yes, because I had wrote this myself.

1 Q And I'm showing you page 1 of the exhibit. This is
2 referring to Sushi Fussion in Brooklyn, correct?

3 A Correct.

4 Q There's nothing about owners here either, right?

5 A Correct.

6 Q You said on direct that Sushi Fussion Express used Sushi
7 Fussion's menu as the basis for its own, right?

8 A Right.

9 Q And Sushi Fussion Express, talking about Sushi Fussion
10 Express's physical menus, did Sushi Fussion Express list any
11 other Sushi Fussion locations on its menu?

12 A All locations, all of my locations.

13 Q And on the menus that were used in your locations, was
14 Sushi Fussion Express listed on those as well?

15 A Yes, it was for marketing purposes. I don't know why.

16 MR. SCHWEITZER: All right. Nothing further.

17 (Continued on next page.)

18

19

20

21

22

23

24

25

1 THE COURT: Let's take a short break. Let's come
2 back in ten minutes, 11:40.

3 THE WITNESS: Am I excused?

4 THE COURT: I don't know -- you're welcome to take a
5 ten minute break, but I don't know if you're excused because
6 your lawyer might have questions.

7 THE WITNESS: Thank you.

8 (Jury exits.)

9 (Recess taken.)

10 (In open court; jury present.)

11 THE COURT: Counsel, do you have any redirect?

12 MR. SAMUEL: No redirect.

13 THE COURT: Okay. Then I guess you are excused.

14 THE WITNESS: Thank you.

15 (Witness excused.)

16 THE COURT: Does the defense rest?

17 MR. SAMUEL: Yes.

18 THE COURT: Okay. All right. Great.

19 I'm sorry that we took a break and now we're going
20 to take lunch but I have a legal issue I need to address with
21 the parties so why don't you take a little extra time and come
22 back at 1:00 p.m. if that's all right. I anticipate closing
23 arguments at 1:00.

24 Great. So I'll see you all at 1:00.

25 (Jury exits.)

Charge Conference

333

1 THE COURT: So have you had enough time to review
2 the charge? We can go over the charge now.

3 MR. SCHWEITZER: Yes, Your Honor.

4 THE COURT: Okay.

5 MR. SCHWEITZER: Beginning with the sentence I
6 highlighted on page 2 at the end to the second to last full
7 paragraph.

8 THE COURT: Right. "There are times where I may ask
9 a witness questions"?

10 MR. SCHWEITZER: Yes.

11 THE COURT: I'll take that out. I didn't ask any
12 questions.

13 Keep scrolling and either stop me if you've got
14 something.

15 On page 3? Four? Five? Six? Seven? Eight?
16 Nine? Ten? Eleven? Twelve?

17 MR. SCHWEITZER: I have one on 12.

18 THE COURT: Sure.

19 MR. SCHWEITZER: When the charge talks about Yang
20 Yang Gao, when he mentioned that he worked at Sushi Fussion
21 LLC, I would ask that he, that wherever it says "Sushi
22 Fussion, LLC" it also say "Sushi Fussion Forest Hills Inc."

23 MR. KATANOV: There was no Forest Hills Inc. It was
24 all LLC. The companies separated in 2016.

25 THE COURT: So just so I have a concrete issue on

Charge Conference

334

1 the table, so there's a paragraph that says: The parties have
2 stipulated the hours Yang Yang Gao worked at Sushi Fussion,
3 Inc. They did not stipulate how much he earned at that
4 restaurant. The parties have not stipulated as to Yang Yang
5 Gao's hours.

6 Give me your proposed edits.

7 MR. SCHWEITZER: So the second paragraph from the
8 bottom, second sentence: The parties have not stipulated as
9 to Mr. Yang Yang Gao's hours or how much he earned at Sushi
10 Fussion, LLC.

11 I propose adding after "Sushi Fussion, LLC," "and
12 Sushi Fussion Forest Hills Inc."

13 THE COURT: Sushi Fussion --

14 MR. SCHWEITZER: But I would be amenable to saying
15 "at Sushi Fussion, LLC" --

16 MR. KATANOV: Forest Hills location.

17 MR. SCHWEITZER: -- "Sushi Fussion Forest Hills
18 location and Main Glatt Kosher Supermarket location."

19 MR. SAMUEL: Yes.

20 THE COURT: Give it to me again.

21 MR. SCHWEITZER: "The parties have not stipulated as
22 to Yang Yang Gao's hours or how much he earned at Sushi
23 Fussion, LLC's Forest Hills location" --

24 THE COURT: Okay.

25 MR. SCHWEITZER: "And Main Glatt Supermarket

Charge Conference

335

1 location."

2 THE COURT: That's M-A-I-N, first word G-L-A-T-T,
3 Supermarket?

4 MR. SCHWEITZER: Yes, Your Honor.

5 THE COURT: Okay. So let me just read back the
6 sentence to both of you.

7 "The parties have not stipulated as to Mr. Yang Yang
8 Gao's hours or how much he earned at Sushi Fussion, LLC's
9 Forest Hills location or the Main Glatt Supermarket Location."

10 MR. SAMUEL: That sounds good.

11 MR. SCHWEITZER: Yes.

12 THE COURT: Okay.

13 MR. SCHWEITZER: I would suggest a similar change be
14 made to the first sentence in the last paragraph on page 12
15 where it says: "You will also need to decide how many hours
16 Yang Yang Gao worked at Sushi Fussion, LLC."

17 It should continue to read: "Sushi Fussion, LLC's
18 Forest Hills location and Main Glatt Supermarket Location."

19 THE COURT: Okay. So let me read back the sentence
20 with that edit.

21 "Accordingly, you will need to decide how many hours
22 Yang Yang Gao worked at Sushi Fussion, LLC's Forest Hills
23 location and Main Glatt Supermarket location." And it
24 continues, how much he was paid.

25 MR. SCHWEITZER: And a similar change to be made to

Charge Conference

336

1 the last sentence beginning: "You will also need to determine
2 whether Yang Yang Gao was a management employee exempt from
3 overtime compensation when he worked at Sushi Fussion LLC's
4 Forest Hills location and Main Glatt Supermarket location."

5 THE COURT: Yes.

6 MR. SAMUEL: He didn't say he was the manager at the
7 Forest Hills location.

8 MR. KATANOV: Only at the supermarket.

9 MR. SCHWEITZER: So could we add another stipulation
10 to that effect?

11 MR. SAMUEL: We're not claiming he was a manager at
12 Forest Hills.

13 THE COURT: Okay. So shall we add the fact that he
14 was not a manager at Forest Hills to the stipulated facts
15 we're going to provide the jury?

16 MR. SCHWEITZER: I would be amenable to that.

17 THE COURT: Do we want the jury to decide it or we
18 don't want the jury to decide it? If we don't want the jury
19 to decide it, we should add the stipulation, right?

20 MR. SAMUEL: Well, can we let the jury decide?

21 THE COURT: Okay. So I'm going to take the proposed
22 edit. "You also need to determine whether Yang Yang Gao was a
23 management employee exempt from overtime compensation when he
24 worked at Sushi Fussion, LLC's Forest Hills location and Main
25 Glatt Supermarket location."

Charge Conference

337

1 MR. SAMUEL: We'll let the jury decide that.

2 THE COURT: Okay.

3 All right. So that takes on to page 13. Does
4 anybody have anything on 13?

5 MR. SCHWEITZER: Yes. In the first paragraph, I
6 would ask that the text from "if you find that some through
7 Sushi Fussion Express Inc." be stricken. "You will also need
8 to decide how much Yang Yang Gao was paid and whether he
9 received proper wage notices and wage statements there."
10 We'll need the jury to decide that.

11 THE COURT: I'm lost. So you're in the first full
12 paragraph on --

13 MR. SCHWEITZER: Thirteen.

14 THE COURT: First sentence: "In addition," is that
15 sentence okay?

16 MR. SCHWEITZER: That sentence is fine.

17 I'm looking specifically at the second sentence.
18 This is saying: "The jury only needs to decide Yang Yang
19 Gao's wages and hours at the Sushi Fussion Express only if
20 they find the defendants were his employers."

21 I don't think that's correct. We can rely on the
22 jury for a verdict as to his wages and hours for purposes of
23 determining Mr. Yagudaev's and Sushi Fussion Express Inc.'s
24 liability.

25 THE COURT: The actual defendants?

Charge Conference

338

1 MR. SCHWEITZER: Yes, or the amount of their damages
2 at any rate.

3 MR. SAMUEL: Is that only for Yagudaev's purposes?
4 Is that what you're --

5 THE COURT: I think he's right. I take it we're all
6 agreed that if the jurors find that the defendants at trial
7 were not Mr. Gao's employers, that ends the inquiry as to
8 those defendants.

9 I think the only question is whether they should
10 make findings about how much Yang Yang Gao was paid and
11 whether he received proper wage notices and statements for the
12 purposes of a default judgment against Mr. Yagudaev and his
13 related entities. Is that right?

14 MR. BERESIN: Is there evidence at this trial about
15 what he was paid by Yagudaev?

16 MR. KATANOV: I don't think so.

17 MR. SCHWEITZER: Yes, there is.

18 THE COURT: They're making that finding based on
19 what, based on the, what?

20 MR. SAMUEL: Well, Mr. Schweitzer said he was going
21 to be making a motion for default judgment after this trial.

22 THE COURT: Right.

23 MR. SAMUEL: So it's probably wrapped up in that.

24 MR. SCHWEITZER: Excuse me. If we can get findings
25 of facts from the jury, then we can pare down the default

Charge Conference

339

1 judgment motion.

2 THE COURT: So what would they be making that
3 finding based on? What's the evidence you're relying on?

4 MR. SCHWEITZER: Yang Yang Gao put in evidence of
5 his salary at, what do you call it, at Sushi Fussion Express.
6 I said he was paid, that he was paid for his first week \$850,
7 then it was raised to \$900, and then on Passover in 2015, it
8 was raised to 925. His hours were stipulated to.

9 THE COURT: I think the question is whether this
10 stipulation by this party binds the absent party. I don't
11 know the answer to it but I don't object to having the jury
12 make findings on this evidence if that's how you want to
13 proceed.

14 Any reason, any legal objection that you have on
15 letting the jury make findings as to the hours that
16 Mr. Schweitzer can then use in his default judgment motion?

17 MR. SAMUEL: I guess that's okay.

18 THE COURT: Okay.

19 All right. So I'm going to say: Separately, you
20 should also decide how much Yang Yang Gao was paid and whether
21 he received proper wage notices and statements when he worked
22 at Sushi Fussion Express Inc.

23 Does that capture it?

24 MR. SCHWEITZER: Yes.

25 THE COURT: Okay. Anything else on page 13?

Charge Conference

340

1 MR. SCHWEITZER: No, Your Honor.

2 THE COURT: Okay. Page 14? Page 15? Page 16?

3 MR. SCHWEITZER: First paragraph, the second
4 sentence is a bit garbled.

5 THE COURT: It's possible that it changed. First, I
6 got what the parties stipulated to.

7 MR. SCHWEITZER: I'm on page 16, the first paragraph
8 beginning: "But you will need to make findings to determine
9 whether Yang Yang Gao was owed overtime and if so, how much."

10 THE COURT: Yes.

11 MR. SCHWEITZER: The second sentence appears --

12 THE COURT: Yes.

13 MR. SCHWEITZER: Like it was cut off in the middle
14 or something.

15 THE COURT: Let me see if I can figure out what
16 happened there. Maybe it's the superfluous "and."

17 MR. SCHWEITZER: You know, I'm not sure we do
18 dispute how much Yang Yang Gao was paid by Sushi Fussion, LLC
19 in particular.

20 Yang Yang Gao testified that he was paid, that he
21 started at 750 at the Forest Hills location and was raised to
22 850 at the Main Glatt Supermarket location. Mr. Katanov
23 testified to the same.

24 THE COURT: Is there anything you want the jury to
25 make findings on?

Charge Conference

341

1 MR. SAMUEL: No.

2 MR. SCHWEITZER: Can we stipulate to that?

3 MR. SAMUEL: That he was paid 50 --

4 MR. SCHWEITZER: That he was paid 750 at Forest
5 Hills and 850 at Main Glatt.

6 MR. SAMUEL: Yes.

7 THE COURT: So my law clerk may be able to draw up a
8 sentence and substitute it in.

9 MR. SCHWEITZER: Maybe strike the "and" and strike
10 "Sushi Fussion, LLC" and the following "and."

11 Then add: "The parties do not dispute how much Yang
12 Yang Gao was paid by Sushi Fussion, LLC" as another sentence.

13 THE COURT: I've got two proposals. My law clerk is
14 simultaneously drafting something.

15 He drafted: "The parties agree that Mr. Gao was
16 paid 750 a week from Sushi Fussion, LLC's Forest Hills
17 location and 850 per week at the Main Street" --

18 MR. SCHWEITZER: "Sushi Fussion, LLC's Main Glatt
19 Supermarket location."

20 THE COURT: Is that fair?

21 MR. SAMUEL: Yes.

22 THE COURT: Okay.

23 MR. SCHWEITZER: And does it continue to say: "The
24 parties continue to dispute what Yang Yang Gao was paid at
25 Sushi Fussion Express."

Charge Conference

342

1 MR. SAMUEL: Sushi Fussion Express? We don't
2 dispute that.

3 MR. SCHWEITZER: Okay. Can we stipulate to that as
4 well?

5 THE COURT: Give me a sentence? "The parties agree"
6 or "the parties do not dispute that" --

7 MR. SCHWEITZER: "The parties do not dispute that --

8 MR. SAMUEL: Well, maybe let's let the jury decide
9 just like they're going to decide --

10 MR. SCHWEITZER: All right. That makes sense.

11 THE COURT: Okay. You will need to decide how much
12 Yang Yang Gao was paid at, which Sushi Fussion?

13 MR. SCHWEITZER: Sushi Fussion Express.

14 THE COURT: Okay. At Sushi Fussion Express, Inc.?

15 MR. SCHWEITZER: Yes.

16 THE COURT: And then we can delete the line after
17 that.

18 So the next line we're going to add: "To do this,
19 you will need to start with a determination of how many hours
20 Yang Yang Gao worked." Right?

21 Okay. So continuing on page 16, anything else on
22 16?

23 MR. SCHWEITZER: No.

24 THE COURT: Anything on 17? Anything on 18?
25 Anything on 19?

Charge Conference

343

1 MR. SCHWEITZER: 19-C where it says, "Sushi Fussion,
2 LLC." That should say "Sushi Fussion, LLC's Forest Hills
3 location and Sushi Fussion, LLC's Main Glatt Supermarket
4 location."

5 THE COURT: Okay. "Defendants claim they were not
6 required to pay Yang Yang Gao's overtime for his work at Sushi
7 Fussion, LLC's Forest Hills location and Sushi Fussion, LLC's
8 Main Glatt Supermarket location."

9 MR. SCHWEITZER: Yes.

10 THE COURT: Anything else on 19 then?

11 MR. SCHWEITZER: No. I have a substantial request
12 for addition on 20.

13 THE COURT: Okay.

14 MR. SCHWEITZER: The salary basis test requires that
15 a person's salary not be subject to deduction based on
16 absences. For that, see Havey versus Homebound Mortgage,
17 Inc., 547 F.3d 158, Second Circuit, 2008.

18 THE COURT: Okay. Do you have language you want to
19 propose?

20 MR. SCHWEITZER: "Generally, an employer that
21 maintains the discretion to reduce an employee's compensation
22 as a result of the employee's hours or the quality of the
23 employee's work may not consider the employee to be paid on a
24 salary basis."

25 THE COURT: All right. Any objection to adding that

Charge Conference

344

1 sentence?

2 MR. SAMUEL: Yes, I would like just to research that
3 issue.

4 THE COURT: Okay. So we've got the first sentence.
5 We'll look at that too and then we can reconvene at the end of
6 lunch and talk about that.

7 Question: Are you claiming that there were
8 deductions that were actually made?

9 MR. SCHWEITZER: There don't need to be deductions
10 that were actually made. There merely needs to be a policy
11 that deductions could be made. Mr. Katanov testified that
12 sushi chefs were subject to the policy of being deducted for
13 hours paid.

14 THE COURT: So do you want to address it now or look
15 at the case?

16 MR. SAMUEL: We'll look at the case.

17 THE COURT: Okay.

18 So I think that this -- I guess the caveat we need
19 to work out is whether this, the initial sentence about
20 deductions.

21 Let me pull up the prior version so I can figure out
22 where we are.

23 (Pause.)

24 MR. SCHWEITZER: This tracks both NYLL and FLSA,
25 Reisch versus Waldbaum, Inc., 62 F.3d 3540.

Charge Conference

345

1 THE COURT: Sorry. Hang on a second.

2 (Pause.)

3 THE COURT: So just so I understand because at the
4 parallel level, there's a FLSA and Labor Law claims. The
5 defense theory is he's exempt under both FLSA and New York
6 Labor Law.

7 MR. SAMUEL: Yes.

8 THE COURT: Do the parties see this test as the test
9 under both because I guess -- I'd very much love to give one
10 test. I think the jury is going to have to find a bunch of
11 stuff and it gets confusing. My one worry is sometimes
12 there's a fifth element under New York Labor Law.

13 Do the parties think that this -- I guess the other
14 way of referring to it, are you pursuing kind of separate FLSA
15 and New York Labor Law theories? Do you think it's sufficient
16 to charge on --

17 MR. SCHWEITZER: I think it's sufficient to charge
18 on, I think it's sufficient to charge on New York because if
19 found, it could displace the FLSA damages.

20 THE COURT: Okay. So I guess then defendants, my
21 question for you is as I take it, the New York law test --
22 well, let me ask the parties.

23 Are you comfortable with this charging language? Do
24 you think it's adequate language for the New York test?

25 MR. SAMUEL: Which page and paragraph?

Charge Conference

346

1 THE COURT: It's under "Exempt Employees." There's
2 a four part test.

3 MR. SCHWEITZER: The four part test, I'm fine with.
4 I wanted the addition of the no deductions for absences as
5 part of the explanation of the salary basis test in
6 particular.

7 THE COURT: All right. So I guess that's the issue
8 we can take up at the end of the lunch break.

9 MR. SAMUEL: Yes.

10 THE COURT: Okay. So continuing on, anything else
11 in this section?

12 MR. BERESIN: Your Honor, thank you.

13 At the very top of page 20, the first line
14 literally, at the end of that first line, I think that word
15 "whose" is a little bit grammatically kind of confusing or
16 doesn't flow.

17 I think it should say: The plaintiff had the
18 authority to hire and fire other employees or the plaintiff's
19 suggestions and recommendations as to the hiring and firing.
20 I think that word "whose" --

21 THE COURT: So I think it should be the plaintiffs.

22 MR. BERESIN: Yes.

23 THE COURT: That seems like a correct grammatical
24 change. Authority to hire or fire employees or the
25 plaintiff's recommendations on hiring and firing, et cetera.

Charge Conference

347

1 MR. SCHWEITZER: No objection.

2 THE COURT: Okay. Continuing, anything else in this
3 section?

4 All right. The next section, I've got "Spread of
5 Hours." Anything in the "Spread of Hours" section? Anything
6 in "Wage Notices"? Anything in "Wage Statements"? Anything
7 in "Good Faith"? Okay. And then anything in "Closing
8 Instructions"?

9 Okay. So I think we've got one issue for you folks
10 to look at during the break. I'm also finishing up a verdict
11 sheet.

12 So can you come back -- we told the jury to come
13 back at 1:00. Can you guys come back at 12:45 and we can
14 resolve that outstanding issue and I'll have that verdict
15 sheet?

16 MR. SCHWEITZER: Okay.

17 THE COURT: Great.

18 (Luncheon recess.)
19
20
21
22
23
24
25

1 **AFTERNOON SESSION**

2 (In open court; jury not present.)

3 THE COURTROOM DEPUTY: All rise.

4 THE COURT: Do you want to talk about the additional
5 language? I looked at the case. Do you have any thoughts on
6 that?

7 MR. SAMUEL: Do you recall what the question was
8 during cross-examination relating to that point?

9 THE COURT: We might be able to get it.

10 MR. SCHWEITZER: I recall what it was. Excuse me.
11 Could -- it was, essentially: Could sushi chefs be deducted
12 in their salary if they missed a day of work?

13 THE COURT: I think that's right. That's my
14 recollection of what it was.

15 MR. SAMUEL: I think that's too general since we
16 didn't really -- I think there's more to it than just that. I
17 have -- let's see. Give me a second.

18 THE COURT: There is more of the testimony -- let me
19 give you some possible language, and you can tell me if you
20 think I should give this language, or what your objection is.
21 Here's what I took from the case.

22 I have the existing language, first element is that
23 the defendant must prove that the defendant was paid at least
24 the minimum salary shown in this table. Then I would go to
25 the table, obviously, and then I would go: An employer that

1 maintains the discretion to reduce an employee's compensation
2 as a result of the employee's hours or the quality of the
3 employee's work may not consider the employee to be paid on a
4 salary basis. However, an employer only maintains such
5 discretion for purposes of this question if, one, the employer
6 has an actual practice of making deductions based on the
7 employee's hours or the quality of the employee's work, or,
8 two, the employer has a clear and particularized policy that
9 effectively communicates that the deductions will be made in
10 specified circumstances.

11 MR. SAMUEL: But, Your Honor, there's been no
12 testimony that any of that happened, so I don't see how they
13 can argue that point.

14 MR. SCHWEITZER: Excuse me. There has been
15 testimony that it was a policy that sushi chefs could have
16 their wages deducted if they missed days of work. That would
17 meet the second prong of the test. Regardless of whether we,
18 here, judge that it subjectively meets the test, the jury
19 should still be instructed on the test and how to apply it.

20 THE COURT: Okay. I think there's enough. I mean,
21 I take it that the parties could make different arguments
22 about whether what Mr. Katanov said was -- indicated there was
23 a policy that effectively communicates that deductions will be
24 made in specified circumstances or not. I think I will
25 include that language and I will leave it to the jury to

1 argue, unless there's anything specific to the language that
2 either party wants to raise.

3 MR. SAMUEL: No.

4 MR. SCHWEITZER: No. That's acceptable.

5 THE COURT: My clerk is going to be here momentarily
6 with the verdict sheet. Anything else for us to take up aside
7 from the verdict sheet?

8 MR. SCHWEITZER: No, Your Honor.

9 MR. BERESIN: We have one question, Your Honor,
10 which is what ability we have to describe the legal -- the
11 profile of the case, as far as the fact that both Yagudaev and
12 our client, Mr. Katanov, were named as defendants in this case
13 in terms of how it happened that way, that the initial
14 complaint was filed against Mr. Yagudaev, it was amended to
15 include our client subsequently.

16 THE COURT: Well, I'll tell you what Mr. Schweitzer
17 said earlier -- I think he said when we are selecting a jury,
18 or he said earlier in the language -- is the Yagudaev
19 defendants are also defendants, but they've defaulted and
20 they're not here or in the case. Is there anything beyond
21 that that you -- first of all, anybody object to that
22 characterization -- characterization along the lines of, they
23 are -- or they were defendants, but they defaulted and they're
24 not here?

25 MR. SCHWEITZER: Certainly not. I would object to

1 any argument that the procedural history of this case is not
2 part of the trial record. It hasn't been brought to the
3 jury's attention.

4 THE COURT: Yes, I'm not sure it would be relevant
5 for the jury to consider who was sued first or second.

6 MR. BERESIN: Okay. Thank you.

7 THE COURT: Sure.

8 (Pause.)

9 THE COURT: So, sorry, one issue. On the exempt
10 employee instruction, do you all have a view on whether under
11 New York Labor Law there's a fifth element that the plaintiff
12 has to customarily and regularly exercise discretionary
13 powers?

14 MR. SCHWEITZER: There is. It's under the
15 hospitality industry wage order, Section 146-3.2(c).

16 THE COURT: But you haven't requested an instruction
17 about that, so tell me what your thinking is.

18 MR. SCHWEITZER: I believe we did. It's -- it was
19 in addition to -- first of all, we definitely did in our
20 submission, and then --

21 THE COURT: Okay.

22 MR. SCHWEITZER: No, no, no. There is an element.
23 I don't know what your -- the Court's pagination is now, but
24 on my page 20 in the paragraph beginning --

25 THE COURT: Got it.

1 MR. SCHWEITZER: -- to establish the plaintiff with
2 an executive employee --

3 THE COURT: Got it. Okay. Are we in agreement
4 about this instruction that -- and I guess then they -- the
5 jurors do need to make separate findings. Are you exempt
6 under New York Labor Law, or are you exempt under FLSA, right?
7 Slightly different.

8 MR. SCHWEITZER: I suppose so.

9 MR. SAMUEL: Yeah.

10 THE COURT: Okay.

11 (Pause.)

12 THE COURT: So I think my clerk is going to hand you
13 guys proposed verdict sheets. The jury might come back, but
14 if so, we can do this after closings. We can take a break
15 then and go over the verdict sheet.

16 THE COURTROOM DEPUTY: Judge, I've got the jury.
17 Do you want me to bring them in?

18 THE COURT: Yes, I think we're ready.

19 THE COURTROOM DEPUTY: Okay. I'm bringing them in.
20 Thank you, Judge.

21 (Pause.)

22 THE COURTROOM DEPUTY: Jury is coming in.

23 (Jury enters.)

24 THE COURT: Okey dokey. Welcome back.

25 So I think we are ready for the parties' closing

1 statements. The closing statements of the parties, as you
2 know, are not themselves evidence, but they're the parties'
3 explanation of what they think the evidence has showed at
4 trial.

5 MR. SCHWEITZER: Hello, ladies and gentlemen. Thank
6 you again for your attentiveness and for your conscientious
7 evaluation of the evidence that I'm sure you will engage in.

8 At the outset of this case, I told you it was going
9 to be about who was in charge, and the evidence you have heard
10 clearly those that Leva Katanov was in charge of all of the
11 Sushi Fussion locations, including Sushi Fussion Express, and
12 that Yang Yang Gao was in charge nowhere.

13 First, Yang Yang Gao.

14 You will hear more about the particular tests that
15 will apply to him from the Court, but briefly, to be an exempt
16 executive employee, an employee's primary duty needs to be
17 management of at least two other employees, not including
18 himself. It strains credulity jewel tee to believe that Yang
19 Yang Gao could have been hired to manage the Sushi Fussion
20 Forest Hills where other employees were hired before him,
21 where Ray, a more senior employee, would have the one extra
22 responsibility that he, Yang Yang Gao, would later have, the
23 Glatt Kosher Supermarket and at Sushi Fussion Express and
24 where he only stayed for about a month. In fact, there's been
25 no contention at all that Yang Yang Gao was ever a manager or

1 an exempt employee at Sushi Fussion in Forest Hills.
2 Importantly, neither was Ray considered a manager, despite
3 having the same responsibilities at Forest Hills that Yang
4 Yang Gao would have at the Glatt Kosher Supermarket. At the
5 Glatt Supermarket, Yang Yang Gao worked with only one other
6 sushi chef at the time and with a cashier, all under the
7 direct supervision of either Mr. Katanov or Robert,
8 Mr. Katanov's partner. There is simply no scope for him to
9 have supervised other employees in that arrangement, and even
10 if he had been, quote, "managing the sushi bar," unquote,
11 there was only one other sushi chef. And you heard that
12 Mr. Katanov and Mr. Gao say that the sushi chefs and the
13 counter person -- Albert -- were equal rank. You heard
14 Mr. Katanov say he never even told Albert to take directions
15 from the sushi chefs, and he wouldn't collaborate with them on
16 his own accord.

17 Now, Mr. Katanov was not regularly present at the
18 supermarket location and did not observe Yang Yang Gao
19 throughout the performance of his duties. He has no basis to
20 speculate as to the proportion of what duties he performed,
21 what proportion of his duties were -- what proportion of his
22 time was spent making sushi and what proportion of his time
23 was spent doing anything else. Mr. Gao, on the other hand,
24 was present every moment that he worked at Glatt Kosher
25 Supermarket, and he testified, based on that knowledge, that

1 he would spend maybe 15 minutes in a week doing anything other
2 than making sushi.

3 An exempt executive employee's salary is also
4 relevant to your decision -- excuse me -- in two ways.

5 First, it must be over a certain threshold that
6 could not change from week to week, and Judge Kovner will
7 instruct you on that. You've heard testimony that Yang Yang
8 Gao made \$750 per week at Sushi Fussion Forest Hills and \$850
9 per week at Sushi Fussion in the supermarket; however,
10 Mr. Katanov failed to keep records of -- of that salary. He
11 reported to his accountant a lower amount, only what was paid
12 by check, and only that amount used -- that was paid by check
13 was used to calculate the payroll tax on Mr. Gao's -- excuse
14 me -- salary.

15 Not only is there an -- an obligation of an employer
16 to keep and maintain time accurate, and complete time and pay
17 records, which was not done here, there is a credibility
18 component to this, too. Mr. Katanov's accountant asked him to
19 provide him, what I would presume to be, an accurate
20 accounting of what he paid his employees. Mr. Katanov failed
21 to do that. He provided the same inaccurate accounting to the
22 United States and New York State governments -- these
23 documents we use to prepare taxes.

24 Ask yourselves if this is someone you can believe
25 when he says -- when he testifies to you about what he

1 observed.

2 Mr. Katanov, importantly, was not able to identify
3 any employees Yang Yang Gao supposedly hired, nor does what
4 either he or Yang Yang Gao described Yang Yang Gao doing
5 amount to hiring employees. Here's what happened: At
6 Mr. Katanov's request, Yang Yang Gao would ask his friends if
7 anyone was interested in working at one of -- one of
8 Mr. Katanov's restaurants. Assuming someone was, he would
9 introduce them. Mr. Katanov or -- excuse me -- or whoever
10 else was in charge would interview them. If they needed an
11 interpreter, Yang Yang Gao would interpret because he knew
12 some English, and Yang Yang Gao did not offer any affirmative
13 recommendations that they be hired or fired. You heard
14 Mr. Katanov say, himself, he had the final say. And you heard
15 Yang Yang Gao say not only did he offer no recommendations,
16 but these -- but that these decisions were made without his
17 input.

18 By way of illustration or comparison, your testimony
19 that Zhenkai Sun also acted as a passive interpreter between
20 Michael Yagudaev and his cousin, Summer, but he also had no
21 input on whether Summer was hired. This is the same thing
22 Yang Yang Gao did. Illustratively, there is no contention
23 that Zhenkai Sun was a manager.

24 Also, tellingly, Zhenkai Sun was hired to work at
25 Sushi Fussion Express without Yang Yang Gao's input at all.

1 Yang Yang Gao was not there the day he was interviewed or
2 hired, did not participate at all in his interview.

3 Returning to primary duty, at Sushi Fussion Express,
4 none of the people Yang Yang Gao was supposedly managing there
5 said he had any authority over him whatsoever. That's Wei Gao
6 and Zhenkai Sun. They both said that no one was in charge;
7 that everyone just did their tasks, and that when Yang Yang
8 Gao was absent, the sushi bar ran as smoothly as when he was
9 there. Both they and Yang Yang Gao described a collaborative
10 work environment at the sushi bar where co-workers could, and
11 did, remind each other tasks that needed doing. All three, as
12 well as Charles Chipengule, testified that they knew what
13 orders to make by being told by the cashier, not from any head
14 chef or sushi chef. Yang Yang Gao described the same
15 situation at the supermarket.

16 Excuse me. Now, Mr. Katanov admits that he owned
17 certain -- certain locations; that he could transfer employees
18 between them based on need, but he denies being able to do
19 that with respect to Michael Yagudaev's restaurants, in
20 particular, Sushi Fussion Express, where each of these
21 plaintiffs worked. You should not find that credible because
22 of the weight of the circumstantial evidence coming against
23 it.

24 Mr. Katanov accepted a percentage of the gross
25 profits from Mr. Yagudaev's restaurant. Mr. Katanov

1 frequently went to that restaurant and provided Mr. --
2 sorry -- Mr. Katanov frequently went to that restaurant to
3 provided Mr. Yagudaev with advice: how to run it, how to keep
4 it clean. He gave that advice directly to employees, and he
5 didn't remember doing that at his deposition back in 2018, but
6 four years later, today, he remembers it, supposedly based on
7 what he saw and heard today in the courtroom. That should
8 give you some idea as to the credibility of the plaintiffs
9 themselves. Mr. Yagudaev -- sorry -- if Mr. Katanov is
10 willing to trust their testimony, maybe you should too.

11 Excuse me. Now, both Wei Gao and Zhenkai Sun and
12 Mr. Katanov all described Mr. Katanov giving instructions as
13 to how to keep the sushi bar clean. Both Mr. Chipengule and
14 Mr. Katanov described Mr. Katanov going into the kitchen, an
15 employee only area, where he gave Mr. Chipengule advice as to
16 improve his cutting sweet potato. Excuse me. This is not
17 something a member of the general public or your consultant
18 can do. This is something that, as Michael would describe
19 him, the big boss, would do.

20 Mr. Katanov frequently borrowed materials from Sushi
21 Fussion Express. He did not pay for those materials. He
22 would return them in kind at some other point. No accounting
23 was made of the exchange of materials between locations or
24 between corporations, and no record -- no record was even made
25 of the financial transaction between Sushi Fussion Express,

1 Inc. and Sushi Fussion, LLC. There was no contract. There
2 was -- there was no written contract, rather. There was no
3 record of payment. We have Mr. Katanov's word only that
4 payments stopped after six months.

5 Now, let's assume they did. In that situation,
6 there was no penalty for Sushi Fussion Express for doing that.
7 They continued to use Sushi Fussion's trademarked trade dress.
8 They continued to use Sushi Fussion's doing business as name.
9 They continued to appear on Sushi Fussion's website where
10 Mr. Katanov admits that he -- excuse me -- that he directed a
11 post of information holding himself and Michael -- that was
12 the owners of Sushi Fussion in Flushing -- Sushi Fussion
13 Express.

14 Excuse me. Mr. Yagudaev used Sushi Fussion's menu
15 as the basis for his own restaurant menu. He only added
16 Hibachi when his separate Hibachi restaurant, that
17 Mr. Chipengule testified about, closed and that -- and its
18 employees and materials were moved into Sushi Fussion Express.
19 And all the locations continued to appear on all location's
20 menus. That is, when customers would go in, they would see,
21 not only is this location where I'm eating at a Sushi Fussion
22 location, this other one is too. This one in Flushing is.
23 This one in Great Neck is. Two in Manhattan. One in Forest
24 Hills. One in Brooklyn.

25 You heard Mr. Katanov testify that he -- that once

Summation - Beresin

360

1 he had multiple locations, he would frequently go in between
2 them to -- excuse me -- to see how business was to supervise
3 as needed. He did the same thing for Sushi Fussion Express.
4 He went there from time to time. He gave advise, he gave
5 instructions. He conferred with Mr. Yagudaev about how
6 business was. Presumably, this was because he had codified to
7 present the profits. All this should tell you that in
8 reality -- excuse me -- Mr. Katanov is the one in charge at
9 all locations and he's responsible for ensuring the integrity
10 of his brand, that he's responsible for making sure customers
11 aren't turned off by uncleanly or -- an uncleanly sushi bar or
12 a sloppy sushi presentation. These are all things he did.
13 These are all things he admits doing. He merely doesn't want
14 to take responsibility for it.

15 I ask that you require him to do so and find in
16 favor of the plaintiffs.

17 THE COURT: Okay.

18 Defense counsel?

19 MR. BERESIN: Good afternoon. Andrew Beresin,
20 attorney for Leva Katanov, and I appreciate the opportunity to
21 speak to you before you get this case to decide the important
22 facts that you have to decide. There are really just a
23 handful of very important issues that you will be deciding.
24 Granted, there are a lot of facts you are going to have to
25 find to make those decisions, but the evidence is clear on the

1 first main issue in this case, and that is that my client,
2 Mr. Katanov and Michael Yagudaev, who is not here, each owned
3 sushi restaurants, but they were separate. They were not
4 managed together. Decisions weren't made jointly,
5 respectively. Mr. Katanov owned and operated his restaurant,
6 and he helped Mr. Yagudaev start his own restaurant by
7 providing him expertise and advice that he didn't have because
8 he was totally new to the business. He did that as a favor.
9 He already had known him, they were friends, but there was
10 going to be some effort required, so, in return, Mr. Yagudaev
11 agreed to pay a royalty -- 5 percent royalty to Mr. Katanov
12 for the time, the effort he was going to put in to support a
13 business that he didn't own. Makes a lot of sense to me.

14 The evidence that you heard supports that the
15 restaurants were separate. They were owned separate. There's
16 been no evidence that they were owned together; that all the
17 decisions to hire employees were made by Mr. Yagudaev when it
18 came to Sushi Fussion Express; and with respect to
19 Mr. Katanov's restaurants, they were made by him.
20 Mr. Yagudaev had nothing to do with those decisions. When it
21 came time to pay employees, Mr. Yagudaev paid each of these
22 employees. Every time they got paid, it was by him.
23 Mr. Katanov paid his own employees at his restaurants.
24 Mr. Yagudaev had nothing to do with that.

25 (Continued on the following page.)

1 MR. BERESIN: (Continuing) Now, the Judge is going
2 to give you instructions on how you need to apply the law to
3 all of the relevant facts in the case.

4 When she gives that to you, it's going to be clear,
5 when you overlay that with the facts that you've seen from
6 this evidence, that the four plaintiffs here, when they worked
7 at Sushi Fussion Express, they were working for Mr. Yagudaev.
8 They testified that he was their boss, they testified that he
9 paid them, he set their schedule. That was consistent. That
10 was consistent. That's the consistent evidence from all four
11 witnesses for the plaintiff.

12 My client, Mr. Katanov, did not hire any of the four
13 plaintiffs to work at Mr. Yagudaev's restaurants. He did not
14 supervise them on any kind of regular basis other than to
15 provide them with some tips and suggestions when he would stop
16 by in order to support his friend, Mr. Yagudaev, and help his
17 restaurant succeed as possible but he was not their employer.
18 He didn't decide how much they got paid. He didn't maintain
19 any employment records with regard to these plaintiffs when
20 they worked for Mr. Yagudaev at the Sushi Fussion Express.

21 The evidence is clear that Mr. Katanov was not their
22 employer when they worked at Mr. Yagudaev's restaurant.

23 Now, another key issue here is going to be Mr. Yang
24 Yang Gao's responsibilities, what work he did when he was
25 working for Mr. Katanov for the two year period when he worked

1 for him and then later, when he worked for Mr. Yagudaev.

2 Again, the evidence has been consistent and clear
3 that he had greater responsibilities than the other sushi
4 chefs and he got paid more for it. There was no dispute in
5 that. Why would you get paid more for doing the same job as
6 everybody else? Wherever I've worked, it doesn't work that
7 way. You do more, you have more responsibilities, you're
8 typically paid more.

9 Also, it's strange for the jury to believe that even
10 at a small operation like a sushi bar with a handful of
11 employees, that no one was in charge on a daily basis in terms
12 of operating. There's always someone in charge. There's
13 always someone who has the ability to instruct, direct, manage
14 the operation to make it run as best as it can.

15 That person was Mr. Yang Yang Gao. He himself
16 testified to that. He said he was in charge, he said he was a
17 manager, that he was the main chef. He exercised discretion
18 on a number of levels. He ordered supplies. Each and every
19 time he requested such supplies, Mr. Katanov simply placed the
20 order for him. He trusted him. He trusted Mr. Yang Yang
21 Gao's judgment on ordering supplies and he took his input on
22 hiring employees. He always sought his input before deciding,
23 before making that final decision with Mr. Yang Yang Gao's
24 input that he sought to help him make that decision.

25 Those are the kinds of things that someone who's not

1 just a line employee does and those are the kind of things
2 that you get paid more to do and Mr. Yang Yang Gao did get
3 paid more to do those things.

4 Finally, I just want to speak to you a little bit
5 about my client and the fact that he's been an entrepreneur at
6 least ten years, creating jobs to the best he could, as many
7 as he could, for as long as he could and still does. He did
8 that for these four plaintiffs here.

9 Now, Mr. Yagudaev is not here but my client is not
10 the only one who was named as a defendant in this case.
11 Mr. Yagudaev was named as a defendant in this case. Why?
12 Because he employed the four plaintiffs. Why is he not here?
13 Because he didn't even respond to the lawsuit. He defaulted.
14 There's no dispute. He was their employer. So why would he
15 even waste time trying to fight that? He's not here. My
16 client is their plan B. They're hoping to recover from him
17 what they may not be able to recover from Mr. Yagudaev who's
18 not here and is in default in this action.

19 Again, the facts of this case are what matter the
20 most and the evidence you've seen consistently from everyone
21 is that my client did not employ these plaintiffs at Sushi
22 Fussion Express. He was not their employer there and he also,
23 his restaurants have no business connection, no formal
24 relationship to Mr. Yagudaev's restaurants in any way. They
25 have no formal connection financially and they are not a

1 single company operating together and never were.

2 So the evidence is clear and you should find, must
3 find, that my client's restaurants and Mr. Yagudaev's
4 restaurants were not a joint single enterprise operating as
5 one company.

6 Thank you.

7 THE COURT: Any rebuttal?

8 MR. SCHWEITZER: No, Your Honor.

9 THE COURT: Okay. Thanks, jurors. So I think the
10 next step is for me to give you some instructions on the law.
11 Before we do that, let's take a ten minute break. Come back
12 at 2:35.

13 (Jurors exit.)

14 THE COURT: I think we made a couple of proofreading
15 changes so we're working on getting you a new copy of the
16 sheet.

17 MR. SCHWEITZER: We're doing a unified verdict
18 sheet?

19 THE COURT: What it will be is the alternative. You
20 want to do it person by person or defendant by defendant?

21 MR. SCHWEITZER: No. It was initially plaintiff by
22 plaintiff so I was curious was to why the change.

23 THE COURT: I think we tried to streamline this a
24 little bit. I think we asked all the relevant questions,
25 person by person.

1 MR. SCHWEITZER: Okay. That's fine.

2 (Recess taken.)

3 MR. SCHWEITZER: Do we have a record of the charge
4 conference.

5 THE COURT: Yes, we do, but in the hopes of trying
6 not to read back the charge conference, what's the issue?

7 MR. SCHWEITZER: There may have been a stipulation
8 reached with regard to --

9 THE COURT: The salary?

10 MR. SCHWEITZER: I think so.

11 THE COURT: So we have that in the jury instruction
12 but we added the language: The parties agree that he was paid
13 750 while at, whichever one it was, Forest Hills, and 850.

14 MR. SCHWEITZER: That's in the updated instructions?

15 THE COURT: Yes. It's on 16 of the instructions.

16 Do you have any objection to my adding it to the
17 joint stipulations?

18 MR. SAMUEL: The 850 per week at Glatt?

19 THE COURT: Yes.

20 MR. SAMUEL: No, no objection.

21 THE COURT: All right.

22 MR. SCHWEITZER: Thank you.

23 Judge, I don't think we have a copy of the new
24 charge.

25 THE COURT: We're working on getting you a final

1 copy of the charge and we're working on getting a verdict
2 sheet that has some, I think, small changes.

3 Do you all have anything on the verdict sheet?

4 MR. SCHWEITZER: No. Broadly speaking, it looks
5 fine.

6 THE COURT: Okay.

7 I think we've got a member of the public in the
8 courtroom.

9 I think we're going to have the jury sit in rows
10 where you are when the jury comes back in a few minutes.
11 We've got an overflow video room.

12 THE CLERK: Courtroom 4-G.

13 (Recess taken.)

14 (In open court; outside the presence of the jury.)

15 MR. BERESIN: On Item 7 of the verdict sheet, we
16 stipulated that Yang Yang Gao was employed by Sushi Fussion,
17 LLC from September of 2011 through October 19th of 2013.

18 We already stipulated to that so this question, I
19 think, should really be asking the jury was he their employer
20 after that?

21 THE COURT: The question I'm looking at is: Was
22 Yang Yang Gao paid at least 1.5 times of his regular rate of
23 pay for overtime work.

24 Do I have that in the right plays?

25 MR. BERESIN: I'm on number 7, top of page 3 of the

1 copy that Jason just handed us.

2 THE COURT: I may be in the wrong copy. I'm sorry.
3 It's renumbered. It starts in a different section.

4 So you're on: Were the following defendants Yang
5 Yang's employer? Is that the question?

6 MR. BERESIN: Yes.

7 THE COURT: Tell me again.

8 MR. BERESIN: So we've stipulated that Sushi
9 Fussion, LLC employed Yang Yang Gao from September 12th of
10 2011 through October 19th of 2013. And that after that, the
11 second stipulation with regard to Mr. Yang Yang Gao is that he
12 then worked for Sushi Fussion Express Inc. at 7132 Main from
13 October 20, 2013, the next day, until October 2 of 2016.

14 THE COURT: Fair enough. Can I take out then this
15 first line about Sushi Fussion, LLP since the parties
16 stipulated that he did work there and there was no dispute
17 about the when?

18 MR. SCHWEITZER: Yes, you can take out the first
19 line Sushi Fussion, LLC. Please add a clarification that the
20 parties have stipulated that Sushi Fussion, LLC employed Yang
21 Yang Gao at least through October 2013.

22 Remove the instruction between question 1.8 and
23 issue 2 since there will be an affirmative yes answer.

24 MR. BERESIN: I'm trying to address a different
25 issue which is that the question is were these entities that

1 Mr. Katanov owns Mr. Yang Yang Gao's employer after he left,
2 after October of 2013. That's really what they -- because
3 we've already -- with regard --

4 THE COURT: So tell me what specific change you're
5 asking for.

6 MR. BERESIN: Yes, to the end of the question. It
7 should say, "after October 12th" or "October 19th of 2013."

8 THE COURT: "After October 19th of 2013"? All
9 right.

10 How do you feel about that?

11 MR. SCHWEITZER: I think that's fine. I would add
12 the additional clarification at the top question: "The
13 parties have stipulated that Sushi Fussion, LLC employed Yang
14 Yang Gao through October 19, 2013" and then the question
15 continues --

16 THE COURT: Can you slow down?

17 "The parties have stipulated that Sushi Fussion" --

18 MR. SCHWEITZER: -- "LLC employed Yang Yang Gao
19 through October 19, 2013," and the question continues.

20 THE COURT: Sorry. Sorry. Employed Yang Yang Gao
21 through October what?

22 MR. SCHWEITZER: 19.

23 THE COURT: October 19th of 2016?

24 MR. SCHWEITZER: '13.

25 THE COURT: And then just continue.

1 MR. SCHWEITZER: Then continue. And then between
2 "enterprise" and the question mark, add "after October 19,
3 2013."

4 THE COURT: And then I'm going to take out "Sushi
5 Fussion, LLC" because we just addressed that in the
6 stipulation.

7 MR. SCHWEITZER: No, we didn't. The question is now
8 about only that period October 20, 2013 and into the future.

9 THE COURT: Well, but is there -- did you offer any
10 evidence that he worked for Sushi Fussion after October 19th
11 of 2013?

12 MR. SCHWEITZER: That he worked at a location?

13 THE COURT: No, that he worked for Sushi Fussion,
14 LLC.

15 MR. BERESIN: That's part of their theory.

16 THE COURT: I see. So I'm going to put this back.
17 So Sushi Fussion is back.

18 MR. BERESIN: Yes, just the date range needs to be
19 included after the 19th of October.

20 THE COURT: Let me read to you what I've got to make
21 sure we're all on the same page.

22 "Question 7: The parties have stipulated that Sushi
23 Fussion, LLC employed Yang Yang Gao through October 19th of
24 2013. Were the following defendants Yang Yang Gao's employer
25 either directly or as part of a single enterprise after

1 October 19th of 2013," and then list the four.

2 MR. SCHWEITZER: Yes.

3 We should also make a similar change to Question 8.

4 THE COURT: Tell me. The numbering restarts.

5 MR. SCHWEITZER: Issue one, Question 8.

6 THE COURT: So it should say after that date, after
7 October?

8 MR. BERESIN: Yes.

9 MR. SCHWEITZER: Again, the parties stipulate that
10 Leva Katanov employed Yang Yang Gao after October 13, 2019.
11 Was he his employer after October 19, 2013.

12 THE COURT: Okay.

13 MR. BERESIN: Thank you.

14 MR. SCHWEITZER: And I think we still want to remove
15 the instruction between question 1.8 and issue 2. The reason
16 why is we're hoping that the jury is going to answer questions
17 about Yang Yang Gao and Sushi Fussion Express regardless of
18 whether they find --

19 THE COURT: Yes. All right. I'm fine with striking
20 that bolded text there and having the jury answer the
21 following questions.

22 Anything else on the verdict sheet?

23 MR. BERESIN: Thank you, Judge. We're just looking
24 through this.

25 (Pause.)

1 THE COURT: So here's the language we've added to
2 the joint stipulation: "Yang Yang Gao was paid \$750 per week
3 at Sushi Fussion, LLC's Forest Hills location and \$850 per
4 week at Sushi Fussion, LLC's Main Glatt Supermarket location."

5 Is that acceptable?

6 MR. SCHWEITZER: Yes.

7 MR. SAMUEL: Yes.

8 MR. SCHWEITZER: Question about issue 9?

9 THE COURT: Okay.

10 MR. SCHWEITZER: The good faith issue goes to
11 liquidated damages and the parties have stipulated to
12 liquidated damages for each of Wei Gao, Zhenkai Sun and
13 Charles Chipengule but I think issue 9, questions 3 through 8,
14 don't need to be addressed.

15 THE COURT: Any reason why I should leave Issue 9?

16 MR. SAMUEL: No, I don't see any reason.

17 THE COURT: I think that's right.

18 MR. SCHWEITZER: Also they can probably be
19 renumbered. We're missing questions 1 and 2 on that issue.

20 THE COURT: All right. So it's just going to start
21 with what is now question 9. That's going to be renumbered.

22 Anything else?

23 MR. SCHWEITZER: No, Your Honor.

24 MR. SAMUEL: No.

25 THE COURT: Okay. So from my perspective, we're

Charge of the Court

373

1 ready for the jury and ready to charge the jury.

2 Anything anybody wants to bring up before we do
3 that?

4 MR. SCHWEITZER: No.

5 MR. SAMUEL: No.

6 THE COURT: Okay. Great. So we can get the jurors.
7 (Jury enters.)

8 THE COURT: Okay. So thank you all for paying such
9 close attention during the trial. I really appreciate it and
10 the parties appreciate it. We are really at the home stretch.

11 Now that the evidence in this case has been
12 presented and the attorneys for the plaintiffs and the
13 defendants have finished their closing arguments, it is my
14 responsibility to instruct you as to the law that governs this
15 case. We're grateful to you for the close attention you have
16 given to the case thus far and I ask that you continue to do
17 so as I give you these instructions.

18 I will provide with you a written copy of the
19 instructions afterwards too so you'll have that. Don't feel
20 like if you miss something, you won't be able to go back and
21 look at it.

22 So my instructions will be in three parts.

23 First, I will instruct you regarding the general
24 rules that define and govern the duties of a jury in a civil
25 case. Second, I will instruct you about the legal elements of

Charge of the Court

374

1 the plaintiffs' claims. And third, I'll instruct as to some
2 general rules regarding your deliberations following the
3 instruction.

4 You should not single out any one instruction as
5 alone stating the law, but you should consider my instructions
6 as a whole when you retire to the jury room.

7 You should not, any of you, be concerned about the
8 wisdom of any rule that I state. Regardless of any opinion
9 that you may have as to what the law may be or ought to be, it
10 would violate your sworn duty to base a verdict upon any other
11 view of the law than that which I give you.

12 Part one: A jury's duty.

13 To begin with, it is your duty to find the facts
14 from all the evidence in this case. You are the sole judges
15 of the facts and it is, therefore, for you and you alone to
16 pass upon the weight of the evidence, to resolve such
17 conflicts as may have appeared in the evidence, and to draw
18 such inferences as you deem to be reasonable and warranted
19 from the evidence.

20 It is your job, not mine, to find the facts. I have
21 neither expressed nor attempted to suggest that I have an
22 opinion about how you should decide the facts in this case.
23 You should not consider anything I have said or done in the
24 course of the trial, including these instructions, as an
25 expression of an opinion about the facts or the merits of this

Charge of the Court

375

1 case. You should attach no special significance to these
2 questions just because I asked them.

3 With respect to any question concerning the facts,
4 it is your recollection of the evidence that controls.

5 My job is to instruct you on the law. You must
6 apply the law to the facts as you find them in accordance with
7 my instructions. While the lawyers may have commented on some
8 of these rules, you must be guided only by what I instruct you
9 about them. You must follow all the rules as I explain them
10 to you. You may not follow some and ignore others. Even if
11 you disagree with some of the rules or don't understand the
12 reasons for some of them, you are bound to follow them.

13 I'll instruct you now about what counts as evidence,
14 and how you should consider it. The evidence you should
15 consider in deciding what the facts are comes in several
16 forms: First, sworn testimony of witnesses, both on direct
17 and cross-examination, and regardless of who called them;
18 second, exhibits that have been received into evidence by the
19 Court; and, third, facts as to which both parties have agreed
20 to in a stipulation. A stipulation is an agreement among the
21 parties that a certain fact is true and you should regard such
22 agreed facts as true.

23 Certain things are not evidence and must, therefore,
24 be disregarded by you in deciding what the facts are. The
25 following are not evidence: First, arguments or statements by

Charge of the Court

376

1 lawyers; second, questions put to the witnesses; third,
2 objections to such questions or to offered exhibits.

3 In this regard, attorneys have a duty to their
4 clients to object when they believe that evidence should not
5 be received. You should not be influenced by such objections
6 or by the Court's ruling on them. If the objection was
7 sustained, ignore the question. If the question was answered
8 before the objection was sustained, you should ignore the
9 question and the answer. If the objection was overruled,
10 treat the answer like any other answer.

11 Fourth of things that are not evidence, testimony
12 that has been excluded, stricken, or that you have been
13 instructed to disregard is not evidence and you must disregard
14 it. Fifth: Obviously anything you might have seen or heard
15 outside the courtroom is not evidence. Sixth: Nothing I have
16 said or done should be used by you to infer that defendants
17 are or are not liable.

18 During the course of the trial, I may have
19 questioned witnesses. I also may have had limited colloquy or
20 debate or arguments with the attorneys. The jury should not
21 draw any inference from observing these interactions. They
22 were conducted for the sole purpose of insuring the orderly
23 and clear presentation of the evidence to you, the jury.

24 In deciding whether or not the plaintiffs have met
25 their burden of proof, you may consider both direct evidence

Charge of the Court

377

1 and circumstantial evidence.

2 Direct evidence is evidence that proves a disputed
3 fact directly. For example, when a witness testifies to what
4 he or she saw, heard or observed, that's called direct
5 evidence.

6 Circumstantial evidence is evidence that tends to
7 prove a disputed fact by proof of other facts. To give a
8 simple example, suppose that when you came into the courthouse
9 today, the sun was shining and it was a nice day, but the
10 courtroom has no windows and so you couldn't look outside.
11 Then, later, as you were sitting here, suppose someone walked
12 in with a dripping wet umbrella and soon afterward, somebody
13 else walked in with a dripping wet raincoat. Now, on our
14 assumed facts, you can't look outside of the courtroom and you
15 can't see whether or not it is raining so you have no direct
16 evidence of that fact, but on the combination of the facts
17 about the umbrella and the raincoat, it would be reasonable
18 for you to infer that it had begun to rain.

19 In this case, the plaintiffs have asked you to draw
20 one set of inferences while the defendants have asked you to
21 draw another set of inferences based on the same evidence.
22 Whether a given inference is or is not to be drawn is entirely
23 a matter for you, the jury, to decide.

24 That is all there is to circumstantial evidence.
25 Using your reason and experience, you infer from established

Charge of the Court

378

1 facts the existence or the nonexistence of some other fact.
2 Please note, however, that it is not a matter of speculation
3 or guess. It's a matter of logical inference.

4 The law makes no distinction between direct and
5 circumstantial evidence. Circumstantial evidence is of no
6 less value than direct evidence, and you may consider either
7 or both, and may give them such weight as you conclude is
8 warranted.

9 Although the plaintiffs bear the burden of proof,
10 the law does not require the plaintiffs to call as witnesses
11 all persons who may appear to have some knowledge of the
12 matters at issue in this trial, nor does the law require that
13 all things mentioned during the trial be produced as exhibits.

14 During the trial, you may have heard the attorneys
15 use the term "inference." In the attorneys' arguments, they
16 may have asked you to infer, on the basis of your reason,
17 experience, and common sense, from one or more established
18 facts, the existence of some other facts.

19 An inference is not a suspicion or a guess. It is a
20 reasoned, logical decision to conclude that a disputed fact
21 exists on the basis of another fact which you find exists.

22 There are times when different inferences may be
23 drawn from facts, whether proved by direct or circumstantial
24 evidence. The plaintiff asks you to draw one set of
25 inferences while the defendant asks you to draw another. It

Charge of the Court

379

1 is for you, and you alone to decide what inferences you will
2 draw.

3 The process of drawing inferences from facts is not
4 a matter of guesswork or speculation. An inference is a
5 deduction or a conclusion which you, the jury, are permitted
6 to draw, but are not required to draw from the facts which
7 have been established by either direct or circumstantial
8 evidence. In drawing inferences, you should exercise your
9 common sense.

10 So while you are considering all the evidence
11 presented to you, you are permitted to draw from the facts
12 which you find to be proven such reasonable inferences as
13 would be justified in light of your experience.

14 Your verdict must be based solely upon the evidence
15 developed at trial or the lack of such evidence. In your
16 deliberations as to whether the plaintiffs have sustained
17 their burden of proof, it is improper for you to allow any
18 personal feelings you may have about a defendant's race or
19 religion or national origin or ethnic background or sex or age
20 influence your decision.

21 It would be equally improper for you to allow any
22 feelings you might have about the nature of the claims in this
23 case to influence your decision making.

24 To repeat, your verdict must be based exclusively
25 upon the evidence, or lack of evidence, as it had has been

Charge of the Court

380

1 presented in this case.

2 In determining the issues of fact and rendering a
3 verdict in this case, you should perform your duty with
4 complete impartiality and without bias, sympathy or prejudice
5 to any party. All parties are equal before the law and are
6 entitled to the same fair consideration. I know that you will
7 carefully and impartially consider all the evidence, follow
8 the law as it is now being given to you, and reach a just
9 verdict regardless of the consequences.

10 In this case, some of the defendants are
11 corporations. The fact that those defendants are corporations
12 and the plaintiffs are individuals does not mean that the
13 corporation defendants are entitled to any lesser
14 consideration by you. All litigants are equal before the law
15 and corporations, big or small, are entitled to the same fair
16 consideration you would give to any other party, to any other
17 individual party.

18 Mandarin Chinese has been spoken during the trial.
19 You are only to consider evidence provided through the
20 official court translator. Although some of you may know
21 Mandarin, it's important that all jurors consider the same
22 evidence. Therefore, you must base your decision on the
23 evidence presented in the English translation. You must
24 ignore any different meaning of the Mandarin words.

25 In deciding what the facts are in this case, you

Charge of the Court

381

1 must consider all the evidence that has been offered. In
2 doing so, you must decide which testimony to believe and which
3 testimony not to believe. You are the sole judges of the
4 credibility of the witnesses and of the weight to be assigned
5 to their testimony. You may choose to disbelieve all or part
6 of any witness' testimony. Any assumption that a witness will
7 speak the truth may be counteracted by the appearance and
8 conduct of the witness, by the manner in which the witness
9 testifies, by the character of the testimony given, or by
10 other evidence or testimony contrary to that witness'
11 testimony.

12 You should carefully scrutinize all the testimony
13 given, the circumstances under which each witness testified,
14 and other matters in evidence that tend to indicate whether a
15 witness' testimony is worthy of belief. Consider each
16 witness' intelligence, motive, state of mind, interest in the
17 prosecution or defense of the case, and his or her demeanor
18 while on the stand.

19 Inconsistencies or discrepancies in the testimony of
20 a witness, or between the testimony of different witnesses,
21 might or might not cause you to discredit their testimony.
22 Two or more people witnessing an incident or transaction may
23 see or hear it differently, and innocent misrecollection, like
24 failure of recollection, is not an uncommon experience. In
25 weighing the effect of a discrepancy, consider whether it

Charge of the Court

382

1 pertains to a matter of importance or to an unimportant
2 detail, and whether it results from innocent error on the one
3 hand, or intentional falsehood on the other. You may also
4 consider whether the witness has an explanation for the
5 inconsistency and whether that explanation appeals to your
6 common sense.

7 If a witness is shown knowingly to have testified
8 falsely concerning any important matter, you have a right to
9 discredit that witness' testimony in other particulars, and
10 you may reject all the testimony of that witness or you may
11 assign it such weight as you think it deserves.

12 In determining the weight to be accorded a witness'
13 testimony, you may consider any demonstrated bias, prejudice
14 or hostility of that witness.

15 The testimony of a single witness is sufficient to
16 prove any fact, even if a greater number of witnesses
17 testified to the contrary, if after considering all of the
18 other evidence, you believe this witness.

19 Now the plaintiffs have the burden of proving each
20 essential element of their claims by a preponderance of the
21 evidence. The defendants have the burden of proving the
22 defense that they are asserting by a preponderance of the
23 evidence.

24 Another way to say this is that the party with the
25 burden of proof on an issue must establish the claim by a fair

Charge of the Court

383

1 preponderance of the credible evidence. To establish a claim
2 by a preponderance of the evidence means to prove that
3 something is more likely so than not so.

4 In other words, a preponderance of the evidence
5 means that when you consider and compare it with the evidence
6 opposed to it -- let me read that again.

7 In other words, a preponderance of the evidence
8 means that, when you consider it and compare it with the
9 evidence opposed to it, convinces you that what is sought to
10 be proved is, more likely than not, true.

11 (Continued on next page.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Charge of the Court

384

1 (Continuing.)

2 THE COURT: A preponderance of the evidence means
3 the greater weight of the evidence. That does not mean the
4 greater number of witnesses or a greater length of time taken
5 by either side. This determination is based on the quality
6 and persuasiveness of the evidence, the weight and effect it
7 has on your mind.

8 In determining whether a claim has been proved by a
9 preponderance of the evidence, you may consider the relevant
10 testimony of all witnesses regardless of which side called
11 them and all the relevant exhibits received in evidence
12 regardless of who may have produced them. If you find that
13 the evidence produced by the party who does not have the
14 burden outweighs the evidence produced by the party who does
15 have the burden of proof, you must find in favor of the party
16 without the burden of proof and against the party with the
17 burden of proof.

18 If you find that the credible evidence on a given
19 issue is in balance or evenly divided between the parties,
20 that it is as probable that one side is right as it is that
21 the other side is right, then you must decide the issue
22 against the party having the burden of proof. That is because
23 the party that has the burden of proof must prove more than
24 simple equality of the evidence. He must prove the elements
25 at issue by a preponderance of the evidence.

Charge of the Court

385

1 On the other hand, the party with the burden of
2 proof does not have to prove more than a preponderance. As
3 long as you find that the scales tip, however slightly, in
4 favor of the party with the burden of proof, that what he
5 claims is more likely true than not true, then that element
6 would have been proved by a preponderance of the evidence.

7 Some of you might have heard of proof beyond a
8 reasonable doubt, which is the standard in a criminal trial,
9 that requirement does not apply to a civil case like this one
10 and you should put it out of your mind.

11 You may have heard evidence during the trial that at
12 some earlier time a witness has said or done something which
13 counsel has argued is inconsistent with the witness's
14 testimony at trial. If you find that a witness actually made
15 a prior inconsistent statement, you are not to consider that
16 prior statement as affirmative evidence in determining a
17 liability. Evidence of a prior inconsistent statement was
18 offered for the limited purpose of helping you decide whether
19 to believe the trial testimony of the witness who contradicted
20 himself. First, you should decide whether there was a prior
21 inconsistent statement.

22 Then, if you find that the witness made an earlier
23 statement that conflicts with his trial testimony you may
24 consider that fact in deciding how much of his trial
25 testimony, if any, to believe. In making this determination,

Charge of the Court

386

1 you may consider whether the witness purposefully made a false
2 statement or whether it was an innocent mistake; whether the
3 inconsistency concerns an important fact or whether it had to
4 do with a small detail; whether the witness had an explanation
5 for the inconsistency and whether that explanation appealed to
6 your common sense. It is exclusively your duty, based upon
7 all the evidence and your own good judgment, to determine
8 whether the prior statement was inconsistent, and if so how
9 much, if any, weight to give to the inconsistent statement in
10 determining whether to believe all or part of the witness's
11 testimony.

12 In evaluating the credibility of witnesses, you
13 should take into account any evidence that a witness may
14 benefit in some way from the outcome of the case. For
15 example, both plaintiff and defendant have an interest in
16 prevailing at trial. An interest in the outcome may create a
17 motive to testify falsely and may sway a witness to testify in
18 a way that advances his or her own interests. Therefore, if
19 you find that any witness whose testimony you are considering
20 may have an interest in the outcome of the trial, then you
21 should bear that factor in mind when evaluating the
22 credibility of his testimony and accept it with great care.
23 Keep in mind, though, that it does not automatically follow
24 that testimony given by an interested witness is to be
25 disbelieved. There are many people who, no matter what their

Charge of the Court

387

1 interest and the outcome of a case may be, will testify
2 truthfully. It is for you decide, based on your perception
3 and common sense to what extent, if at all, the witness's
4 interest has affected his testimony.

5 Some of the testimony before you is in the form of
6 depositions which have been received into evidence. A
7 deposition is simply a procedure where, prior to a trial, the
8 attorneys for one side may question a witness or an adversary
9 party under oath before a court stenographer. This is part of
10 a pretrial discovery and each side is entitled to take
11 depositions. You may consider the testimony of a witness
12 given in a deposition according to the same standards you
13 would use to evaluate the testimony of a witness given at
14 trial.

15 In reaching a verdict, you must bear in mind that
16 each defendant is to be considered separately, solely on the
17 evidence or lack of evidence presented against that defendant,
18 without regard for the liability of the other defendants.
19 Similarly, in reaching a verdict, you must bear in mind that
20 each plaintiff's claims are to be considered solely on the
21 evidence or lack of evidence presented in support of those
22 claims.

23 Okay, so this is part two about substantive law. So
24 I will now instruct you as to the law governing the
25 plaintiff's claims. The plaintiffs made claims under the New

Charge of the Court

388

1 York Labor Law and the Fair Labor Standards Act. Because the
2 New York Labor Law and Fair Labor Standards Act are very
3 similar in application, I usually do not distinguish between
4 them in my instructions to you. I will only point out
5 differences between the two laws when it's necessary to do so.

6 Now, plaintiffs have brought four categories of
7 claims each of which I will now briefly summarize and then I
8 will explain the law governing each claim in greater depth.
9 First, plaintiffs claim that defendants violated the Fair
10 Labor Standards Act and the New York Labor Law by failing to
11 pay them overtime at one and a half times the regular hourly
12 pay for all hours worked in excess of 40 hours in a single
13 week.

14 Second, plaintiffs claim that defendants violated
15 the New York Labor Law by failing to pay them spread of hours
16 compensation. An employee is entitled to spread of hours
17 compensation on days that the employee's workday is longer
18 than ten hours. Spread of hours compensation is equal to an
19 extra hour of pay at the minimum wage rate.

20 Third, plaintiffs claim that Defendants did not
21 provide them with accurate wage notices as required by the New
22 York Labor Law.

23 And finally, plaintiffs claim that Defendants did
24 not provide them with accurate wage statements as required by
25 the New York Labor Law.

Charge of the Court

389

1 Now, the parties have stipulated or agreed as to the
2 overtime wages and spread of hours compensation owed to Wei
3 Gao, Zhenkai Sun and Charles Chipengule. The parties have
4 also stipulated or agreed that Wei Gao, Zhenkai Sun and
5 Charles Chipengule did not receive proper wage notices or wage
6 statements. Therefore, with respect to those plaintiffs, you
7 will need to determine only whether the defendant's Levy
8 Katanov, Sushi Fussion LLC, Sushi Fussion of 47th Street,
9 Inc., Sushi Fussion of Forest Hills, Inc. and Sushi Fussion
10 NYC were their employers. The parties have stipulated to the
11 hours Yang Yang Gao worked at Sushi Fussion Express, Inc., but
12 they have not stipulated how much he earned at that
13 restaurant. The parties have not stipulated as to Yang Yang
14 Gao's hours or how much he earned -- is this line correct?

15 MR. SCHWEITZER: I don't think so, Your Honor.

16 THE COURT: Okay, give me one minute. We may have
17 failed to update one line in this.

18 (Pause in proceedings.)

19 THE COURT: We needed to edit this instruction to
20 take into account additional factors the parties have agreed
21 on, as the version I was reading didn't reflect that.

22 Can the court reporter read the last part of the
23 record?

24 (Record read.)

25 THE COURT: So, in that sentence, part of what I

Charge of the Court

390

1 read to you is inaccurate. The sentence should read: The
2 parties have not stipulated as to Yang Yang Gao's hours at
3 Sushi Fussion LLC's Forest Hills location or Main Glatt
4 Supermarket location and the parties have not stipulated as to
5 whether Yang Yang Gao received proper wage notices and wage
6 statements. Accordingly, you will also need to decide how
7 many hours Yang Yang Gao worked at Sushi Fussion LLC's Forest
8 Hills location and Main Glatt Supermarket location, and
9 whether he received proper wage notices and wage statements
10 while working there.

11 You will also need to determine whether Yang Yang
12 Gao was a management employee, exempt from overtime
13 compensation, when he worked at Sushi Fussion LLC's Forest
14 Hills location and Main Glatt Supermarket location. In
15 addition, you will need to decide whether Mr. Katanov, Sushi
16 Fussion LLC, Sushi Fussion of 47th Street, Inc., Sushi Fussion
17 of Forest Hills, Inc. and Sushi Fussion of NYC, Inc. were Yang
18 Yang Gao's employers when he worked at Sushi Fussion Express,
19 Inc.

20 Separately, you should also decide how much Yang
21 Yang Gao was paid and whether he received proper wage notices
22 and wage statements when he worked at Sushi Fussion Express,
23 Inc.

24 The defendants at this trial are several
25 corporations and an individual. In order for you to find that

Charge of the Court

391

1 a defendant was liable to a plaintiff, you must find that that
2 defendant was that plaintiff's employer. The parties disagree
3 about whether Leva Katanov was an employer of the plaintiffs.
4 The parties also disagree about whether four of the corporate
5 defendants, Sushi Fussion LLC, Sushi Fussion of 47th Street,
6 Inc., Sushi Fussion of Forest Hills, Inc., and Sushi Fussion
7 of NYC, Inc. are employers of plaintiffs. A person or company
8 can be an employer because that defendant possessed control
9 over that plaintiff as an employee. An employee may have a
10 single employer or may have multiple employers. A person or a
11 company may be an employer even if his or it's control over
12 the employee is restricted, indirect or only occasional. You
13 should consider the totality of the circumstances that
14 constitute the economic reality of the employer/employee
15 relationship. The focus is on the economic reality of the
16 situation rather than technical concepts or job titles. You
17 may consider several factors in determining whether a
18 defendant was a plaintiff's employer based on the defendant's
19 control of the employee. No single factor is controlling and
20 you must make your decision based on the totality of the
21 circumstances. Relevant factors include whether a defendant,
22 1, had the power to hire or fire the particular plaintiff; 2,
23 supervised or controlled the plaintiff's work schedule or
24 conditions of employment; 3, determined the plaintiff's rate
25 and method of pay -- of payment; and, 4, maintained the

1 plaintiff's employment records.

2 The factors I have just listed are not exhaustive.
3 You may also consider any other factors that you think are
4 relevant to determining whether a defendant had the power to
5 control the means and manner of a plaintiff's employment.

6 Evidence that an individual is an owner or officer
7 of a company, or otherwise makes corporate decisions that have
8 nothing to do with an employee's function, is insufficient to
9 demonstrate employer status. Instead, to be an employer, an
10 individual defendant must possess control over a company's
11 operations in a manner that relates to a plaintiff's
12 employment. Evidence showing an individual's authority over
13 management, supervision and oversight of a company's affairs
14 in general is relevant to the totality of the circumstances in
15 determining the individual's operational control of the
16 company employing the plaintiff employees.

17 An employee may also impose liability for violations
18 of the Fair Labor Standards Act and New York Labor Law, or on
19 other entities that are part of a single integrated
20 enterprise. For example, a parent company and its
21 wholly-owned subsidiary entities may be treated as a single
22 employer, or separate entities under common ownership and
23 management may be treated as a single employer. Whether a
24 group of entities qualifies as a single integrated enterprise
25 turns on four factors. First, inter-relation of operations;

Charge of the Court

393

1 second, centralized control of labor relations; third, common
2 management; and fourth, common ownership or financial control.
3 No factor is dispositive.

4 Each plaintiff has the burden to prove by a
5 preponderance of the evidence that each defendant was his
6 employer.

7 Okay, the next section goes to overtime pay claims.
8 Under the Fair Labor Standards Act and New York Labor Law, an
9 employer is required to pay certain employees at least one and
10 a half times the employee's regular rate for time that is
11 worked over 40 hours in a work week. A work week is a fixed
12 and regularly repeating period of 168 hours; that is, seven
13 consecutive 24-hour days. Put another way, if an employee
14 works more than 40 hours in one work week, the employer must
15 pay the employee the overtime rate of 1.5 times the regular
16 rate for all the time that's worked after the first 40 hours
17 and this is commonly known as time-and-a-half pay for overtime
18 work.

19 In order for the defendant's to be liable for
20 failing to pay overtime as required by law, the plaintiff must
21 prove by a preponderance of the evidence the following
22 elements: First, the plaintiff must prove that he was
23 employed by the defendant; second, the plaintiff must prove
24 that he was employed in an enterprise that engaged in commerce
25 that had annual gross sales of at least \$500,000; and third,

Charge of the Court

394

1 the plaintiff must prove the defendant failed to pay him time
2 and a half overtime wages for hours works in excess of 40 in
3 one or more work weeks.

4 Now, in regarding the first element, if you found
5 that a plaintiff was not an employee of a defendant, then the
6 defendant in question is not liable for any violations of the
7 minimum wage or overtime requirements. The parties have
8 stipulated, or agreed, that defendants were all covered by the
9 Fair Labor Standards Act such that the second element is
10 satisfied for each defendant.

11 With respect to the third element, the plaintiff
12 must establish by a preponderance of the evidence that during
13 part or all of the time period he was employed by the
14 defendants, the defendants did not pay him the overtime amount
15 that is required by law. The parties have stipulated as to
16 the hours worked and overtime wages owed to plaintiffs Charles
17 Chipengule, Wei Gao, and Zhenkai Sun, but you will need to
18 make findings to determine whether Yang Yang Gao was owed
19 overtime and, if so, how much. The parties agree that Yang
20 Yang Gao was paid \$750 per week at Sushi Fussion LLC's Forest
21 Hills location and \$850 per week at Sushi Fussion LLC's Main
22 Street Glatt Supermarket location. However, you will need to
23 decide how much Yang Yang Gao was paid at Sushi Fussion
24 Express, Inc.

25 To do this, you will need to start with the

Charge of the Court

395

1 determination of the hours Yang Yang Gao worked. The parties
2 have stipulated or agreed on the number of hours that Yang
3 Yang Gao worked for Sushi Fussion Express, Inc., but the
4 parties dispute how many hours Yang Yang Gao worked for Sushi
5 Fussion LLC, so you will need to make findings about that one.

6 The number of hours an employee works in a day is
7 determined under what is called the continuous workday rule.
8 Under that rule, the workday begins when an employee begins to
9 engage in his principal activity or activities and it
10 continues until the completion of those activities. It
11 includes all time within that period whether or not the
12 employee is engaged in work throughout the entire period. An
13 employee's principal activities are the activities performed
14 as part of the regular work of an employee and in the regular
15 course of his or her employment. A plaintiff may rely on the
16 defendant's payroll records to establish the time that he
17 worked and the compensation he was paid. If the defendants
18 failed to keep accurate records, the plaintiff has satisfied
19 his burden if he proves that he has in fact performed work for
20 which he was improperly compensated and he produces sufficient
21 evidence to show the amount and extent of that work as a
22 matter of just and reasonable inference. The plaintiff's
23 burden is not high. It's possible for the plaintiff to meet
24 his burden through estimates based on his own recollection.

25 Once the plaintiff satisfies his burden, the

Charge of the Court

396

1 defendant's may rebut that evidence, and may rebut with
2 evidence of the precise amount of work performed or with
3 evidence to negate the reasonableness of the inference to be
4 drawn from the plaintiff's evidence.

5 After determining how many hours Yang Yang Gao
6 worked, the next issue you must determine is how much Yang
7 Yang Gao was paid per hour by Sushi Fussion LLC, and Sushi
8 Fussion Express, Inc., and I will refer to that as the regular
9 rate of pay.

10 You may consider all of the evidence received at
11 trial when you determine regular rate of pay. However, if you
12 find that the defendants did not keep and maintain the
13 required employment records, then Yang Yang Gao can meet his
14 burden by presenting sufficient evidence to show the amounts
15 he was paid as a matter of just and reasonable inference.
16 That means he may rely on his own testimony regarding his
17 recollection of what he was paid. You should find he met his
18 burden of proof if you find that his testimony is credible and
19 provides a basis for a reasonable approximation of the wages
20 he was paid. If you find that a plaintiff has satisfied that
21 burden, then the defendants have the burden to show the
22 inferences drawn from the testimony are unreasonable.

23 Now, before you decide Yang Yang Gao's regular rate
24 of pay, you must first decide whether he was paid on an hourly
25 basis, or if he was paid a salary or a flat rate for an agreed

Charge of the Court

397

1 upon period of time. If you find that Yang Yang Gao was paid
2 at an hourly rate, then you don't have to do any math to
3 determine his regular rate of pay. The rate he was paid per
4 hour is his regular rate of pay. However, if you determine
5 that Yang Yang Gao was paid a flat amount to cover an
6 agreed-upon period of time; for example, flat monthly pay,
7 then you must convert his rate to into a weekly rate and then
8 divide his weekly rate by the lesser of 40 hours or the actual
9 number of hours he worked that week to determine his regular
10 rate of pay, rounding to the nearest cent.

11 Let me give you an example of such a calculation
12 now. If you find that the plaintiff was paid a flat monthly
13 rate, you would follow the following steps to find the rate he
14 was paid. First, you would convert plaintiff's monthly salary
15 to a yearly salary by multiplying it by 12 months per year,
16 then you would divide his yearly salary by 52 weeks per year
17 to get his weekly salary.

18 For example, if the plaintiff earned \$866.67 per
19 month, you would multiply that number 866.67 by 12 months per
20 year to arrive at a yearly rate of \$10,400, and then you would
21 divide \$10,400 by 52 weeks per year and you would arrive at a
22 weekly salary rate of \$200 per week. Once you have the
23 plaintiff's weekly rate of pay, you would divide his weekly
24 salary by the lesser of 40 hours or the actual number of hours
25 he worked that week. The resulting number, rounded to the

Charge of the Court

398

1 nearest cent, is his regular rate of pay.

2 Continuing our example, the plaintiff earns \$200 for
3 a week in which he worked 25 hours per week, then you would
4 divide 200 per week by 25 hours and you would find a rate of
5 \$8 per hour. If, on the other hand, plaintiff earned \$200 for
6 working a 50-hour week, you would divide \$200 by 40 hours per
7 week because 40 is less than 50 and you would arrive at an
8 hourly rate of \$5 per hour.

9 An employee must be paid at a rate of at least one
10 and one-half times either the employees regular rate of pay or
11 the statutory minimum wage, whichever is greater, for all
12 overtime hours. Because the applicable minimum wage in the
13 New York Labor Law was the same or higher than the federal
14 minimum wage during the relevant period, and because
15 plaintiffs cannot recover twice for the same overtime wage
16 violations under both federal and state law, you will be
17 applying the minimum wage rate under the New York Labor Law.

18 Under New York Labor Law, the applicable minimum
19 wages were as follows -- and there's a chart that I will give
20 you, obviously, but for the period as of January 1st of 2011
21 through December 30 of 2013, the minimum wage was 7.25 per
22 hour. From December 31st, 2013 to December 30th, 2014, the
23 minimum wage was \$8 per hour. From December 31, 2014 through
24 defense 30, 2015, the minimum wage was \$875 -- sorry, \$8.75.
25 And from December 31, 2015 through December 30, 2016, the

1 minimum wage was \$9 per hour.

2 If you find that Yang Yang Gao's regular wage rate
3 was less than or equal to the minimum wage, then overtime
4 should be calculated based on the legal minimum wage that he
5 was entitled to receive for the time period in question and
6 not on what Yang Yang Gao was actually paid. In that case the
7 overtime wage is -- the overtime rate is 1.5 times the
8 statutory minimum wage. If you find that Yang Yang Gao's
9 regular rate of pay exceeds the applicable minimum wage then
10 you would determine his overtime rate by multiplying his
11 regular rate of pay by 1.5 which increases it by 50 percent.

12 Okay. The next instruction is about exempt
13 employees.

14

15 (Continued on the following page.)

16

17

18

19

20

21

22

23

24

25

1 (Continuing.)

2 THE COURT: The defendants' claim that they were not
3 required to pay Yang Yang Gao overtime for his work at Sushi
4 Fussion, LLC's Forest Hills location and Sushi Fussion, LLC's
5 Main Glatt Supermarket location because he was not in the
6 category of employees who were covered by the overtime law.
7 In other words, defendants say that Mr. Gao was an exempt
8 executive employee, and I will define for you what it means to
9 be a exempt executive employee.

10 An executive employee is exempt from the overtime
11 payment requirements under the FLSA and New York Labor Law.
12 In other words, employers do not have to pay overtime to
13 executive employees. In order for the defendants to establish
14 that plaintiff was an executive employee exempt from the
15 FLSA's overtime requirements, the defendants must prove by a
16 preponderance of the evidence the following elements:

17 First, that the plaintiff was paid a certain minimum
18 salary; second, that the plaintiffs primary duties were
19 management of the enterprise in which he was employed or
20 management of a customarily recognized department or
21 subdivision of that enterprise; third, the plaintiff
22 customarily and regularly directed the work of two or more
23 other employees; and, fourth, that the plaintiff had the
24 authority to hire and fire other employees or the plaintiff's
25 suggestions and recommendations as to the hiring, firing,

1 advancement, promotion or any other change of status of other
2 employees are given particular weight.

3 To establish that the plaintiff was an executive
4 employees exempt from the New York Labor Law's overtime
5 requirements, the defendants must prove by preponderance of
6 the evidence those four elements and also fifth element that
7 the plaintiff customarily and regularly exercises the
8 discretionary powers.

9 Let me explain those first four elements in a little
10 more detail.

11 So the first element, as I said, is that the
12 defendant must prove that the plaintiff was paid at least a
13 certain minimum salary, and there's a table for that salary
14 that you will have that it's set. It's from January 1st,
15 2011, through December 30, 2013, a salary of \$543.75 per week;
16 from December 31st, 2013, through December 30, 2014, the
17 minimum salary was \$600 per week; from December 31st, 2014,
18 through December 30, 2015, it was minimum salary of \$656.26
19 per week; and from December 31st, 2015, through December 30,
20 2016, it's a minimum salary of \$675 per week.

21 An employer that maintains the discretion to reduce
22 an employee's compensation as a result of the employee's hours
23 or the quality of the employee's work may not consider the
24 employee to be paid on a salary basis. However, an employer
25 only maintains such discretion for purposes of this question

1 if the employer has an actual practice of making deductions
2 based on an employee's hours or the quality of the employee's
3 work, or if the employer has a clear and particularized policy
4 that effectively communicates that deductions will be made in
5 specified circumstances.

6 The second element of this management exemption is
7 that the plaintiffs' primary duties or management of the
8 enterprise in which he was employed, or management of a
9 customarily recognized department or subdivision of the
10 enterprise.

11 Primary duty means the principal, main, major or
12 most important duty that the employee performs. In order to
13 determine an employee's primary duty, you must consider all
14 the facts in the case with a major emphasis on the character
15 of the employee's job as a whole. Factors to consider when
16 determining the primary duty of an employee include, but are
17 not limited to, the relative importance of the exempt duties
18 as compared with other types of duties; the amount of time
19 spent performing exempt work; the employee's relative freedom
20 from direct supervision; and the relationship between the
21 employee's salary and the wages paid to other employees for
22 the kind of nonexempt work performed by the employee.

23 The amount of time performing spent performing
24 exempt work can be a useful guide in determining whether
25 exempt work is the primary duty of an employee. Thus,

1 employees who spend more than 50 percent of their time
2 performing exempt work will generally satisfy the primary duty
3 requirement. Time alone, however, is not the sole test. It's
4 not necessary for exempt employees to spend more than
5 50 percent of their time performing exempt work. Employees
6 who do not spend more than 50 percent of their time performing
7 exempt duties may nonetheless meet the primary duty
8 requirement if the other factors support such a conclusion.

9 The following are some examples of management
10 activities. Now, these examples are not exclusive. Some
11 examples are interviewing, selecting, and training of
12 employees; setting and adjusting their rates of pay and hours
13 of work; directing the work of employees; maintaining
14 production or sales records for use in supervision or control;
15 appraising employees' productivity and efficiency for the
16 purpose of recommending promotions or other changes in status;
17 handling employee complaints and grievances; disciplining
18 employees; planning the work; determining the techniques to be
19 used; apportioning the work among employees; determining the
20 type of materials, supplies, machinery, equipment, or tools to
21 be used or merchandise to be bought, stocked, and sold;
22 controlling the flow and distribution of materials or
23 merchandise and supplies; providing for the safety and
24 security of the employees or the property; planning and
25 controlling the budget; and monitoring or implementing legal

1 compliance measures.

2 The third element of this exempt employee issue is
3 that the plaintiff customarily and regularly directed the work
4 of two or more other employees. "Customarily and regularly"
5 means a frequency that must be greater than occasional, but
6 which of course may be less than constant. Tasks or work
7 performed customarily and regularly includes work normally and
8 recurrently performed every workweek. It does not include
9 isolated or one-time tasks. The phrase "a customarily
10 recognized department or subdivision" is intended to
11 distinguish between a mere collection of employees assigned
12 from time to time to a specific job or series of jobs, and a
13 unit with permanent status and function. A customarily
14 recognized department or subdivision must have a permanent
15 status and a continuing function.

16 The phrase "two or more other employees" means two
17 full-time employees or their equivalent. One full-time and
18 two half-time employees, for example, are equivalent to two
19 full-time employees. Four half-time employees are also
20 equivalent to two full-time employees. The supervision can be
21 distributed among two, three, or more employees, but each such
22 management employee must customarily and regularly direct the
23 work of two or more other full-time employees or the
24 equivalent. Thus, for example, a department with five
25 full-time nonexempt workers may have up to two exempt

1 supervisors if each such supervisor customarily and regularly
2 directs the work of two of those workers. An employee who
3 merely assists the manager of a particular department and
4 supervises two or more employees only in the actual manager's
5 absence does not meet this requirement.

6 The fourth element is that the plaintiff had the
7 authority to hire and fire other employees, or that the
8 plaintiffs' suggestions and recommendations as to the hiring,
9 firing, advancement, promotion, or other change of status of
10 other employees are given particular weight. To determine
11 whether an employee's suggestions and recommendations are
12 given particular weight, factors to be considered include, but
13 are not limited to, whether it is part of the employee's job
14 duties to make such suggestions and recommendations; the
15 frequency with which such suggestions and recommendations are
16 made or requested; and the frequency with which the employee's
17 suggestions and recommendations are relied on. Generally, an
18 executive's suggestions and recommendations must pertain to
19 employees whom the executive customarily and regularly
20 directs. It does not include an occasional suggestion with
21 regard to the change and status of the co-worker. An
22 employee's suggestions and recommendations may still be deemed
23 to have particular weight even if a higher level manager's
24 recommendation has more importance, and even if the employee
25 does not have the authority to make the ultimate decision as

1 to the employee's change of status.

2 The issue before you is not whether it was necessary
3 to have more than one manager or whether it was a wise
4 business decision to staff a location in a way that defendants
5 did. There's no limit to how many executive employees can be
6 in a company. In other words, a company can have more than
7 one executive employee at the same time.

8 If the defendant proves all of the elements of the
9 executive exemption defense by a preponderance of the
10 evidence, then you must find that the employee is exempt from
11 the overtime pay requirement.

12 The next instruction is about spread-of-hours
13 compensation.

14 The New York Labor Law requires that an employer pay
15 an employee one additional hour of pay at the basic minimum
16 hourly rate on each day during which the spread of hours
17 exceeds ten. The spread of hours is the length of the
18 interval between the beginning and the end of an employee's
19 workday, including any working time or breaks. For example,
20 if an employee began work at 9:00 a.m., took a one-hour lunch
21 break from 12:00 noon to 1:00 p.m. and then finished work at
22 8:00 p.m., then the employee's spread of hours would be 11
23 hours. The employee would be entitled to an additional hour
24 of pay at the basic New York Labor Law minimum hourly rate.

25 The parties have stipulated -- or agreed -- about

1 the spread-of-hours compensation owed to Wei Gao, Zhenkai Sun,
2 and Charles Chipengule, so you need to decide only if Yang
3 Yang Gao is entitled to unpaid spread-of-hours compensation.
4 If you find by a preponderance of the evidence that Yang Yang
5 Gao worked a spread of hours that exceeded ten hours, you will
6 need to determine also the number of days on which this
7 occurred.

8 The next instruction is about wage notices.

9 Plaintiffs claim that defendants violated a
10 provision of the New York Labor Law that requires employers to
11 provide employees a written notice of their wages.

12 The parties have stipulated that Wei Gao, Zhenkai
13 Sun, and Charles Chipengule were not provided with proper wage
14 notices. You need decide only if Yang Yang Gao was provided
15 with a proper wage notice.

16 The New York Labor Law requires employers to provide
17 employees within ten business days of the start of employment
18 a written notice containing the following information: the
19 rate or rates of pay and basis thereof, whether paid by the
20 hour, shift, day, week, salary, piece, commission, or other;
21 allowances, if any, claimed as part of the minimum wage,
22 including tip, meal, or lodging allowances; the regular pay
23 day designated by the employer; the name of the employer; any
24 "doing business as" names used by the employer; the physical
25 address of the employer's main office or principal place of

1 business, and a mailing address if different; and the
2 telephone number of the employer. The notice must be provided
3 in English and in the language identified by the employee as
4 his primarily language.

5 If you find by a preponderance of the evidence that
6 defendants did not provide the proper notice to Yang Yang Gao,
7 you should state the number of days that the defendant failed
8 to provide this notice to each plaintiff or to the plaintiff.

9 The next instruction is about wage statements. The
10 plaintiffs also claim that the defendants failed to give them
11 wage statements that they were required to provide under New
12 York law.

13 The parties have stipulated that Wei Gao, Zhenkai
14 Sun, and Charles Chipengule were not provided proper wage
15 statements, but you will need to decide if Yang Yang Gao was
16 provided proper wage statements.

17 New York law requires employers to provide employees
18 a written wage statement with every payment of wages that
19 contain certain information. For all employees, the wage
20 statement has to include the dates of work covered by the
21 payment of wages; the name of the employee; the name of the
22 employer; the address and phone number of the employer; the
23 rate or rates of pay and basis of those wages, whether paid by
24 the hour, shift, day, week, salary, piece, commission, or
25 other; gross wages; deductions; allowances, if any, claimed as

1 part of a minimum wage; and net wages. Wage statements for
2 employees who are not exempt from overtime compensation must
3 also state the regular hourly rate or rates of pay; the
4 overtime rate or rates of pay; the number of regular hours
5 worked; and the number of overtime hours worked.

6 In order to prevail on a wage statement claim, a
7 plaintiff must prove by a preponderance of the evidence the
8 defendants did not give him the required wage statement with
9 at least one wage payment.

10 If you find that plaintiff Yang Yang Gao was not
11 provided with proper wage statements, you must also determine
12 how many weeks Yang Yang Gao did not receive the proper wage
13 statements.

14 Okay. The next instruction is about good faith. If
15 you find that any defendants were employers of Wei Gao,
16 Zhenkai Sun, or Charles Chipengule, that defendants were
17 employers of Yang Yang Gao and Sushi Fussion Express and
18 failed to pay him overtime or spread-of-hours compensation, or
19 that defendants failed to pay Yang Yang Gao overtime or
20 spread-of-hours compensation at Sushi Fussion, LLC, and that
21 Yang Yang Gao was not exempt, then you will need to determine
22 whether the defendants acted in good faith.

23 I will now instruct you on how to determine if the
24 defendants acted in good faith.

25 To act in good faith is to act with an objectively

Charge of the Court

410

1 reasonable grounds for believing that certain acts or
2 omissions did not violate the law. It is the defendants'
3 burden to establish good faith. It is not enough for
4 defendants to claim that they did not know that their acts or
5 omissions violated the law. To establish good faith, the
6 defendants must prove that they took active steps to ascertain
7 the dictates of the law, and that they then took action to
8 comply with the law as they understood it.

9 Okay. The last section is closing instructions.

10 I've now outlined for you the rules of law
11 applicable to this case, the process by which you weigh the
12 evidence and determine the facts and the legal elements, which
13 must be proved by a preponderance of the evidence. In a few
14 minutes, you will retire to the jury room for your
15 deliberations. I'm going to give you some general rules about
16 your deliberations.

17 Keep in mind that nothing I have said in these
18 instructions is intended to suggest to you in any way what I
19 think your verdict should be. That is entirely for you to
20 decide. By way of reminder, I charge you once again that it
21 is your responsibility to judge the facts in this case from
22 the evidence presented during the trial and to apply the law
23 as I have given it to you. Remember also that your verdict
24 must be based solely on the evidence in this case and the law
25 as I have given it to you and not on anything else.

Charge of the Court

411

1 Foreperson.

2 In order for your deliberations to proceed in an
3 orderly fashion, you must have a foreperson. The custom in
4 this Court is for Juror Number 1 to be the foreperson, but if
5 when you begin deliberations you decide that you want to elect
6 another foreperson, you are welcome to do so. The foreperson
7 will be responsible for signing all communications to the
8 Court and for handing them to the deputy marshal during your
9 deliberations, but, of course, the foreperson's vote is
10 entitled to no greater weight than that of any other juror.

11 Communications with the Court.

12 It is very important that you not communicate with
13 anyone outside the jury room about your deliberations or about
14 anything touching on this case. There's only one exception to
15 that rule. If it becomes necessary during your deliberations
16 to communicate with me, you can send me a note through the
17 deputy marshal signed by your foreperson. No member of the
18 jury should attempt to communicate with me except by assigned
19 writing, and I will never communicate with any member of the
20 jury on any subject touching on the merits of the case other
21 than in writing or orally here in open court.

22 Juror's recollection governs and requests for trial
23 testimony.

24 Your recollection governs. Nobody else's. If, in
25 the course of your deliberations, your recollection of any

Charge of the Court

412

1 part of the testimony should fail or you should find yourself
2 in doubt concerning my instructions on the law, you can
3 request that a witness or witnesses' testimony, or portions
4 thereof, be sent back to you in the jury room. Again, you
5 would make such a request by a note to the deputy marshal, but
6 I suggest that you be specific to avoid receiving testimony
7 that you don't want or don't need. Describe as best and
8 precisely as you can what you want to hear and be patient
9 because sometimes it takes a little while for us to find that
10 testimony in the record.

11 Deliberations.

12 Your duty is to reach a fair conclusion from the law
13 and the evidence. It is an important one. When you are in
14 the jury room, listen to each other and discuss the evidence
15 and issues in the case amongst yourselves. It's the duty of
16 each of you as jurors to consult with one another and to
17 deliberate with a view toward reaching an agreement on a
18 verdict, if you can do so without violating your individual
19 judgment and conscience. While you should not surrender
20 conscientious convictions of what the truth is and of the
21 weight and effect of the evidence, and while each of you must
22 decide the case for yourself and not merely acquiesce in the
23 conclusion of fellow jurors, you should examine the issues and
24 the evidence before you with candor and frankness and with
25 proper deference to and regard for the opinions of your fellow

Charge of the Court

413

1 jurors.

2 You should not hesitate to reconsider your opinions
3 from time to time and to change them if you are convinced they
4 are wrong. However, do not surrender an honest conviction as
5 to the weight and effect of the evidence simply to arrive at a
6 verdict.

7 The decision you reach must be unanimous; so you all
8 have to agree.

9 When you have reached a verdict, simply send me a
10 note signed by your foreperson indicating that you have
11 reached a verdict, but please do not indicate what the verdict
12 is. In no communication to the Court should you give a
13 numerical count of where the jury stands in its deliberation.

14 Remember in your deliberations that the dispute
15 between the parties is for them no passing matter. They and
16 the Court rely upon you to give full and conscientious
17 deliberation and consideration to the issues and evidence
18 before you. By doing so, you carry out to the fullest your
19 oaths as jurors to well and truly try the issues of this case
20 and to render a true verdict.

21 Once you have reached your verdict, you will record
22 your decisions on the verdict sheets that I prepared for you.
23 You should proceed through the questions on the verdict sheet
24 in the order in which they are listed, and the foreperson
25 should complete the verdict sheet, date it, and sign it. The

Charge of the Court

414

1 foreperson should then give a note to the marshal outside your
2 door stating that you have received a verdict. Don't specify
3 what your verdict is in the note. The foreperson should keep
4 the verdict sheet until I ask you for it. You must be all in
5 agreement with the verdict if it's announced in court.

6 I will ask you to wait for a few moments while I
7 discuss with counsel if there's anything else that you need to
8 be charged with.

9 Do you guys want to approach?

10 (Sidebar.)

11 (Continued on next page.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Sidebar

415

1 (Sidebar conference held on the record out of the
2 hearing of the jury.)

3 MR. SAMUEL: We have nothing to add.

4 MR. SCHWEITZER: We have nothing to add.

5 THE COURT: I'm planning to send back the exhibits,
6 a copy of the charge and the verdict sheet and the
7 stipulations.

8 MR. SAMUEL: Okay.

9 THE COURT: Make sense to everybody?

10 MR. SCHWEITZER: Yes.

11 (Sidebar conference ends.)

12 (Continued on following page.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (In open court.)

2 THE COURT: Great. So thank you. We're going to
3 send you back to the jury room to deliberate. We're going to
4 also send you copies of the exhibits, a copy of the verdict
5 sheet, a copy of my instructions on the law, and a copy of the
6 stipulation which reflects the facts of which all the parties
7 have agreed.

8 As I indicated in the instructions, if you want
9 testimony read back to you at any point, you can send me a
10 note about that.

11 It's now around 3:00, so my thought is if you can
12 deliberate until 4:30, I recognize that you may need more time
13 than that, so I assume that you will all call it a day at 4:30
14 and come back tomorrow if you haven't reached a verdict then.
15 But if 4:30 comes around and you tell me, we want to stay and
16 work on this today, we think we're close enough, send me a
17 note to that effect and we can accommodate that too.

18 Thanks, everybody.

19 THE COURTROOM DEPUTY: Marshal, please raise your
20 right hand.

21 (Marshal sworn.)

22 THE MARSHAL: I will.

23 THE COURTROOM DEPUTY: Thank you, marshal.

24 (The jury retired to commence deliberations at 2:57
25 p.m.)

1 (In open court; jury not present.)

2 (Court's Exhibit 2 received in evidence.)

3 THE COURT: Okay. So we have a note from the
4 jurors. The note says: "Can we get the written instructions
5 and the verdict sheet. We only have the exhibits and
6 stipulations." So with the parties' permission, I have gone
7 ahead and sent the instructions and the verdict sheet back.

8 That's it. I'm sorry you had to come all the way up
9 for that.

10 (Court in recess awaiting the verdict of the jury.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (In open court; jury not present.)

2 (Court's Exhibit 3 and 4 received in evidence.)

3 THE COURTROOM DEPUTY: All rise.

4 THE COURT: Please be seated.

5 THE COURTROOM DEPUTY: Judge, two notes.

6 THE COURT: Okay. So we have two notes. Note
7 number one: "Can you please clarify what Michael Yagudaev's
8 defaulting means and what results from that?"

9 Note two: "Is there an error in the verdict sheet?"
10 -- which I'd ask Jason to check -- "after one seven and one
11 eight it suggests we skip to the end. This seems to ignore
12 calculations for the years prior to 10/20/2013. Are the years
13 Yang Yang Gao worked for SF, LLC, not part of this case?"

14 THE CLERK: Will you read that note again, Judge?

15 THE COURT: Here it is.

16 THE CLERK: Sure. Thank you.

17 THE COURT: So what do you parties think about what
18 the response should be on these?

19 MR. SCHWEITZER: For note 3, there is an error in
20 the verdict sheet that the instruction was supposed to have
21 been stricken.

22 THE CLERK: Which instruction was supposed to have
23 been stricken?

24 MR. SCHWEITZER: The one between Section 1 and
25 Section 2.

Proceedings

419

1 THE CLERK: Okay.

2 THE COURT: Yes. So we are just going to delete
3 that whole --

4 THE CLERK: Do you want me to reprint and give them
5 a corrected version?

6 THE COURT: Yes. All right. So what I've done is
7 delete that bolded text at the end of sheet one before sheet
8 two.

9 Are we all in agreement about that?

10 MR. SAMUEL: Yes.

11 MR. SCHWEITZER: Yes.

12 THE COURT: So we are going to reprint that.

13 So I'm writing a physical note that says, "Response
14 to note. Yes, there is an error in the verdict sheet. Please
15 use" -- can you write on there, Jason -- sorry -- somewhere on
16 that document or write on the physical document "revised"?

17 THE CLERK: Can I write it in pen?

18 THE COURT: Yes.

19 Please use the attached revised verdict sheet.

20 I'm giving you this note and then you can put that
21 note on the verdict sheet and we can go ahead and give that
22 back to the jurors.

23 THE COURTROOM DEPUTY: Sure, Judge.

24 THE COURT: Okay. So what do you parties think with
25 respect to the question about Mr. Yagudaev?

1 MR. SCHWEITZER: A defaulting defendant admits the
2 allegations against him, admits to liability -- excuse me --
3 and permits the Court to find damages. It is your task to
4 decide what the factual allegations made against Mr. Yagudaev
5 and his companies with respect to Yang Yang Gao are. The
6 parties have stipulated to what those allegations are with
7 respect to the other plaintiffs.

8 THE COURT: Are you in agreement with that? Or is
9 there something else that you want?

10 MR. BERESIN: Your Honor, defense -- we feel that it
11 means that Mr. Yagudaev is subject to a default judgment being
12 entered against him in which he would be liable to the
13 plaintiffs for the claims against him. It doesn't have
14 anything to do with our client.

15 THE COURT: All right. So give me your proposed
16 language again, and I will ask if there's an objection to the
17 proposed language. I've got -- I write slower than you speak,
18 but I've got: A defaulting defendant admits the allegations
19 against him.

20 MR. SCHWEITZER: And permits the Court to -- excuse
21 me -- and permits the Court to find liability and damages
22 against him. The parties have stipulated to the amount of
23 damages with respect to Wei Gao, Zhenkai Sun, and Charles
24 Chipengule. It is your task to determine what, if any --
25 excuse me -- the facts underlying --

1 THE COURT: The parties have stipulated to the
2 amount of --

3 MR. SCHWEITZER: -- damages for Wei Gao, Charles
4 Chipengule, and Zhenkai Sun. It is your task to find what the
5 factual allegations are supporting damages against --

6 THE COURT: I want to try to streamline this. So
7 "Can you please clarify what Michael Yagudaev's defaulting
8 means and what results from that?" So I think as to that, it
9 is sufficient to say a defaulting defendant -- as to what it
10 means, can I say: A defaulting defendant does not participate
11 in -- a defaulting defendant chooses not to participate --

12 MR. SCHWEITZER: Yes.

13 THE COURT: -- in the litigation of the case?

14 MR. SCHWEITZER: Yes.

15 THE COURT: So how about: A defaulting defendant
16 chooses not to participate in the litigation of a case. A
17 defaulting defendant admits the allegations against him and
18 permits the Court to find liability and damages against him.

19 MR. SCHWEITZER: That's fine.

20 THE COURT: Okay.

21 Is that okay with you?

22 MR. SAMUEL: Yeah.

23 THE COURT: Will you type it up?

24 Just so you know what it says, "A defaulting
25 defendant chooses not to participate in the litigation of a

1 case. A defaulting defendant admits the allegations against
2 him and permits the Court to find liability and damages
3 against him."

4 MR. SCHWEITZER: No objection.

5 THE COURT: Okay.

6 (Court in recess awaiting the verdict of the jury.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 (In open court; jury not present.)

2 (Court's Exhibit 5 received in evidence.)

3 THE COURT: So we've got a note, and it says we've
4 reached a verdict, so I'm going to call the jurors back and
5 ask for their verdict form.

6 THE COURTROOM DEPUTY: Okay, Judge.

7 (Jury enters.)

8 MR. SAMUEL: Can we just wait one minute for my
9 client to come?

10 THE COURT: Sure.

11 MR. SAMUEL: He's coming upright now.

12 THE COURT: Okay.

13 (Pause.)

14 MR. SAMUEL: Can I step out for a minute?

15 THE COURT: Sure.

16 (Pause.)

17 MR. SAMUEL: He'll be here in 30 seconds.

18 THE COURT: Okay. Great.

19 (Pause.)

20 THE COURT: Okey dokey. So I understand the jury
21 has reached a verdict; is that right?

22 THE JURY FOREPERSON: Yes.

23 THE COURT: Great. I'll have Mr. Chan take the
24 verdict sheet.

25 THE COURTROOM DEPUTY: Mr. O'Donnell?

1 Thank you. Thank you so much.

2 (Pause.)

3 THE COURT: Will you read the verdict form from
4 jury?

5 THE COURTROOM DEPUTY: Sure, Judge.

6 Zhenkai Sun, Wei Gao, Yang Yang Gao, also known as
7 Eddie Gao, and Charles Chipengule, on behalf of themselves and
8 others similarly situated against Sushi Fussion Express,
9 Incorporated, et al., 16-CV-4840.

10 Issue I: Employer Status.

11 Question 1: Were the following defendants Wei Gao's
12 employer, either directly or as part of a single integrated
13 enterprise?

14 As to Sushi Fussion, LLC: No.

15 As to Sushi Fussion of 47th Street, Inc.: No.

16 As to Sushi Fussion of Forest Hills, Inc.: No.

17 As to Sushi Fussion of New York City, Inc.: No.

18 Question 2: Was Leva Katanov a/k/a Levi Katanov
19 a/k/a Leo Katanov Wei Gao's employer? Answer: No.

20 Question 3: Were the following defendants Zhenkai
21 Sun's employer either directly or as part of a single
22 integrated enterprise?

23 As to Sushi Fussion, LLC: No.

24 As to Sushi Fussion of 47th Street, Inc.: No.

25 As to Sushi Fussion of Forest Hills, Inc.: No.

1 As to Sushi Fussion of New York City, Inc.: No.

2 Question 4: Was Leva Katanov a/k/a Levi Katanov
3 a/k/a Leo Katanov Zhenkai Sun's employer? Answer: No.

4 Question 5: Were the following defendants Charles
5 Chipengule's employer either directly or as part of a single
6 integrated enterprise?

7 As to Sushi Fussion, LLC: No.

8 As to Sushi Fussion of 47th Street, Inc.: No.

9 As to Sushi Fussion of Forest Hills, Inc.: No.

10 As to Sushi Fussion of New York City, Inc.: No.

11 Question 6: Was Leva Katanov a/k/a Levi Katanov
12 a/k/a Leo Katanov Charles Chipengule's employer? Answer: No.

13 Question 7: The parties have stipulated that Sushi
14 Fussion, LLC, employed Yang Yang Gao through October 19, 2013.
15 Were the following defendants Yang Yang Gao's employer either
16 directly or as part of a single integrated enterprise after
17 October 19th, 2013?

18 As to Sushi Fussion, LLC: No.

19 As to Sushi Fussion of 47th Street, Inc.: No.

20 As to Sushi Fussion of Forest Hills, Inc.: No.

21 As to Sushi Fussion of New York City, Inc.: No.

22 Question 8: The parties have stipulated that Leva
23 Katanov a/k/a Levi Katanov a/k/a Leo Katanov employ Yang Yang
24 Gao through October 19th, 2013. Was Leva Katanov a/k/a Levi
25 Katanov a/k/a Leo Katanov Yang Yang Gao's employer after

1 October 19th, 2013? Answer: No.

2 Issue II: Overtime.

3 Question 1: How many hours did Yang Yang Gao work
4 per week at Sushi Fussion LLC's Forest Hills location? If the
5 number of hours per week changed, please note when it changed
6 and what it changed to. The answer is 63.

7 How many hours did Yang Yang Gao work per week at
8 Sushi LLC's Main Glatt Supermarket Location? If the number of
9 hours per week changed, please know when it changed and what
10 it changed to. Answer: 63.

11 Question 2A: Was Yang Yang Gao paid on an hourly
12 basis at Sushi Fussion Express, Inc., or was he paid salary or
13 flat rate for agreed-upon period of time? He was paid salary
14 or flat rate.

15 Question 2B, skip.

16 2C: If you found that Yang Yang Gao was paid a
17 salary or flat rate at Sushi Fussion Express, Inc., what was
18 the dollar amount and unit time (days, weeks, months, or
19 years) that Yang Yang Gao was paid at Sushi Fussion, LLC?
20 \$750 per week and \$800 per week at the Forest Hills
21 supermarket.

22 Question 3: During Yang Yang Gao's employment, did
23 he work overtime hours at Sushi Fussion, LLC, Forest Hills
24 location that is more than 40 hours per week? Answer: Yes.

25 Question 4: During Yang Yang Gao employment, did he

1 work overtime hours at Sushi Fussion LLC's Main Glatt
2 Supermarket Location that is more than 40 hours per week?

3 Answer: Yes.

4 Question 5: How many overtime hours, if any, did
5 Yang Yang Gao work per week at Sushi Fussion LLC's Forest
6 Hills location? Subtract 40 hours from the number of hours
7 found in response to question 11.1. If the number of hours
8 per week changed, please note when they change and what it's
9 changed to. 23 hours.

10 How many overtime did Yang Yang Gao work per week,
11 if any, at Sushi Fussion LLC's Main Glatt Supermarket
12 location? Subtract 40 hours from the number of hours found in
13 response to question 11.1. If the number of hours per week
14 changed, please note when they changed and when it changed to.
15 The answer is 23 hours.

16 Question 6: Was Yang Yang Gao paid at least 1.5
17 times the greater of the minimum wage or his regular rate of
18 pay for each overtime hour at Sushi Fussion LLC's Forest Hills
19 location? Answer: No.

20 Question 7: Was Yang Yang Gao paid at least 1.5
21 times the greater of the minimum wage of his regular rate of
22 pay for such overtime at Sushi LLC's Main Glatt Location?
23 Answer: No.

24 Question 8: The parties have stipulated that Yang
25 Yang Gao worked more than 40 hours per week at Sushi Fussion

1 Express, Inc. Was Yang Yang Gao paid at least 1.5 times the
2 greater of the minimum wage of his regular rate of pay for
3 each overtime hour at Sushi Fussion Express, Inc.? Answer:
4 No.

5 Question 9: Was Yang Yang Gao an executive employee
6 at Sushi Fussion LLC's Forest Hills location who was exempt
7 from receiving overtime under the Fair Labor Standard Act?
8 Answer: No.

9 Was Yang Yang Gao an executive employee at Sushi
10 Fussion LLC's Forest Hills location who was exempt from
11 receiving overtime under the New York Labor Law? Answer: No.

12 Question 10: Was Yang Yang Gao an executive
13 employee at Sushi Fussion LLC's Main Glatt Supermarket
14 Location who was exempt from receiving overtime under the Fair
15 Labor Standards Act? Answer: No.

16 Was Yang Yang Gao an executive employee at Sushi
17 Fussion LLC's Main Glatt Supermarket location who was exempt
18 from receiving overtime under the New York Labor Law? Answer:
19 No.

20 Issue III: Spread of Hours at Sushi Fussion LLC.

21 Question 1: Did Yang Yang Gao's spread of hours at
22 Sushi Fussion LLC's Forest Hills location exceed ten hours on
23 any given day at any time during his employment? Answer:
24 Yes.

25 Question 2: Indicate the number of days per week,

1 if any, you find that Yang Yang Gao spread of hours exceeded
2 ten hours at Sushi Fussion LLC's Forest Hills location. If
3 the number of days per week changed, please note when they
4 change and what it changed to. Answer: Four days.

5 Question 3: Was Yang Yang Gao paid at least one
6 additional hour of pay at the applicable New York minimum wage
7 for each day his spread of hours exceeded ten hours at Sushi
8 Fussion LLC's Forest Hills location? Answer: No.

9 Question 4: How many days, if any, was Yang Yang
10 Gao not paid spread-of-hours compensation that he was owed at
11 Sushi Fussion LLC's Forest Hills location? Sixteen days.

12 Question 5: Did Yang Yang Gao's spread of hours at
13 Sushi Fussion LLC's Main Glatt Supermarket location exceed ten
14 hours on any given days at any time during his employment?
15 Answer: Yes.

16 Question 6: Indicate the number of days per week,
17 if any, you find that Yang Yang Gao's spread of hours exceeded
18 ten hours at Sushi Fussion LLC's Main Glatt Supermarket
19 Location. If the number of days per week change, please note
20 when it changed and what it changed to. Five days from
21 September 2011 to April 2012, and then September 2012 to
22 April 2013. And six days, May 2012 to August 2012. And then
23 May 2013 to August 2013. And then five days, September 2013
24 to October 2013.

25 Question 7: Was Yang Yang Gao paid at least one

1 additional hour pay at the applicable New York minimum wage
2 for each day his spread of hours exceeded ten hours at Sushi
3 Fussion LLC's Main Glatt Supermarket location? Answer: No.

4 Question 8: How many days, if any, was Yang Yang
5 Gao not paid spread-of-hours compensation that he was owed at
6 Sushi Fussion LLC's Main Glatt Supermarket Location? 572
7 days.

8 Issue IV: Spread of Hours at Sushi Fussion Express,
9 Inc.

10 Question 1: Did Yang Yang Gao spread of hours at
11 Sushi Fussion Express, Inc., exceed ten hours on any given
12 days at any time during his employment? Answer: Yes.

13 Question 2: Indicate the number of days per week,
14 if any, you find that Yang Yang Gao spread of hours at Sushi
15 Fussion Express, Inc., exceeded ten hours. If the number of
16 days per week changed, please note when it changed and what it
17 change to. Five days.

18 Question 3: Was Yang Yang Gao paid at least one
19 additional hour's pay at the applicable New York minimum wage
20 for each days his spread of hours exceeded ten hours at Sushi
21 Fussion Express, Inc.? Answer: No.

22 Question 4: How many days, if any, was Yang Yang
23 Gao not paid spread-of-hours compensation that he was owed at
24 Sushi Fussion, LLC Main Glatt Supermarket location? Answer:
25 765 days.

1 Issue V: Wage Notification at Sushi Fussion LLC.

2 Question 1: Was Yang Yang Gao provided with an
3 adequate wage notice of Sushi Fussion LLC within ten days of
4 his date he was hired? Answer: No.

5 Question 2: Was Yang Yang Gao provided with an
6 adequate wage notice at any point during his employment at
7 Sushi Fussion LLC? Answer: No.

8 Issue VI: Wage Notification at Sushi Fussion
9 Express, Inc.

10 Question 1: Was Yang Yang Gao provided with an
11 adequate wage notice at Sushi Fussion Express, Inc. within ten
12 days of his date he was hired? Answer: No.

13 Question 2: Was Yang Yang Gao provided with an
14 adequate wage notice of any point during his employment at
15 Sushi Fussion Express, Inc.? Answer: No.

16 Issue VII: Wages Statement at Sushi Fussion, LLC.

17 Question 1: Was Yang Yang Gao provided with a full
18 and accurate wage statement on each payday during his
19 employment at Sushi Fussion, LLC? Answer: No.

20 Question 2: For how many weeks was Yang Yang Gao
21 not furnished a full and accurate wage statement at Sushi
22 Fussion, LLC? 108 weeks.

23 Issue VIII: Wage Statements at Sushi Fussion
24 Express, Inc.

25 Question 1: Was Yang Yang Gao provided with a full

1 and accurate wage statement on each payday during his
2 employment at Sushi Fussion Express, Inc.? Answer: No.

3 Question 2: For how many weeks was Yang Yang Gao
4 not furnished a full and accurate wage statement at Sushi
5 Fussion Express, Inc.? 153 weeks.

6 Let me see.

7 (Pause.)

8 THE COURTROOM DEPUTY: Issue IX: Good Faith.

9 Question 1: To an extent defendant failed to pay
10 Yang Yang Gao adequate overtime wages, did they nevertheless
11 act in good faith? Answer: No.

12 Question 2: To the extent defendant failed to pay
13 Yang Yang Gao's adequate spread of hours wages, did they
14 nevertheless act in good faith? Answer: No.

15 Signed by foreperson Mr. O'Donnell, Juror Number 1.

16 THE COURT: Thank you, Mr. Chan.

17 Would you mind polling the jurors?

18 THE COURTROOM DEPUTY: Sure, Judge.

19 Juror Number 1, Mr. O'Donnell, is that your verdict?

20 JUROR NUMBER 1: Yes.

21 THE COURTROOM DEPUTY: Juror Number 2, Ms. Rios, is
22 that your verdict?

23 JUROR NUMBER 2: Yes.

24 THE COURTROOM DEPUTY: Juror Number 3, Ms. Holland,
25 is that your verdict?

1 JUROR NUMBER 3: Yes.

2 THE COURTROOM DEPUTY: Juror Number 4, Mr. McGinn,
3 is that your verdict?

4 JUROR NUMBER 4: Yes.

5 THE COURTROOM DEPUTY: Juror Number 5,
6 Ms. Dumas-Hydleburg, is that your verdict?

7 JUROR NUMBER 5: Yes.

8 THE COURTROOM DEPUTY: Juror Number 6, Mr. Curtis,
9 is that your verdict?

10 JUROR NUMBER 6: Yes.

11 THE COURTROOM DEPUTY: Juror Number 7, Ms. Francis,
12 is that your verdict?

13 JUROR NUMBER 7: Yes.

14 THE COURTROOM DEPUTY: Juror Number 8,
15 Mr. Lamattina, is that your verdict?

16 JUROR NUMBER 8: Yes.

17 THE COURTROOM DEPUTY: Jury polled, Judge.

18 THE COURT: Are there any issues the parties want to
19 take up with me before I thank and excuse the jurors?

20 MR. SCHWEITZER: Yes, Your Honor.

21 (Sidebar.)

22 (Continued on next page.)

23

24

25

Sidebar

434

1 (Sidebar conference held on the record out of the
2 hearing of the jury.)

3 MR. SCHWEITZER: I believe Question 22 was worded
4 confusingly. The jury found the weekly wage rates for the
5 Forest Hills location and the Glatt location, but they were
6 also asked about Sushi Fussion Express, Inc. I'm willing to
7 not make an objection out of that because we can still move
8 for default judgment against that.

9 THE COURT: Sushi Fussion Express is one -- I have a
10 hard time keeping all of my sushi -- are they a defaulting
11 defendant?

12 MR. SCHWEITZER: That's a defaulting defendant.

13 THE COURT: So I think that's probably the way to
14 go.

15 MR. SAMUEL: Yes. We can clean it up.

16 MR. SCHWEITZER: Additionally, there was a note I
17 have issue with, Question 4.4. This was -- this is following
18 a question about Sushi Fussion Express, but I believe this is
19 erroneously included a question about Sushi Fussion LLC --
20 4.4, and 3.8 both ask about Main Glatt Supermarket.

21 THE COURT: I think that's correct. I think I made
22 an error on this verdict form, and the sentence should have
23 said, Sushi Fussion Express, Inc., in this phrase, and I
24 assume that's what the jurors understood, but I would be
25 inclined to ask them.

Sidebar

435

1 MR. SAMUEL: So this applies to Sushi Fussion
2 Express, which --

3 MR. SCHWEITZER: That would apply to Sushi Fussion
4 Express. This is what applies to the -- yeah.

5 MR. SAMUEL: Oh.

6 THE COURT: I guess I have the same question if it's
7 the defaulting defendant or do we really need to --

8 MR. SCHWEITZER: No, we don't.

9 THE COURT: Anything you've got?

10 MR. SAMUEL: No.

11 THE COURT: Okay. Great.

12 (Sidebar ends.)

13 (Continued on following page.)

14

15

16

17

18

19

20

21

22

23

24

25

1 (In open court.)

2 THE COURT: I want to thank you all very, very much
3 on my behalf and behalf of the parties. I don't comment at
4 all on the substance of any verdict ever, because that's your
5 job, it's not my job, but you all paid really close attention
6 during trial. You were all here on time and took your
7 responsibilities as jurors really seriously. And this case is
8 really important to the plaintiffs and to the defendants, so I
9 am really grateful, and I know that the parties are also
10 really grateful for you taking time out of your lives,
11 particularly during COVID, but at any time to do that.

12 So I want to thank you all, and you are all excused,
13 and don't feel the need to come back here tomorrow.

14 Thank you.

15 (Jury exits.)

16 THE COURT: Do you all have anything you want to
17 take up at this point?

18 MR. SCHWEITZER: Scheduling for default judgment
19 motion.

20 THE COURT: Sure. So I'm not sure that you have
21 filed a request that the clerk of court note the default yet
22 at this point, have you?

23 MR. SCHWEITZER: I don't believe so, no.

24 THE COURT: Okay. So how long do you want to file
25 it, the motion for default judgment?

Proceedings

437

1 MR. SCHWEITZER: I don't know. Four weeks?

2 THE COURT: All right. That's fine with me, so
3 we'll do a docket entry that reflects that.

4 MR. SCHWEITZER: And the parties should confer about
5 a statement of damages taking into account the facts found by
6 the jury.

7 THE COURT: That would be helpful.

8 MR. SCHWEITZER: And we can get that in by 14 days.

9 THE COURT: That work for you?

10 MR. SAMUEL: Let's make it 21, if we can.

11 MR. SCHWEITZER: Works for me.

12 THE COURT: Sounds great. So we will do a docket
13 entry that reflects those two dates.

14 Anything else for us to take care of today?

15 MR. SCHWEITZER: No, Your Honor.

16 MR. SAMUEL: Nothing from defendants.

17 THE COURT: Okay. Thanks everybody, and I
18 appreciate all your work in trying this case.

19 (Matter concluded.)

20

21 * * * * *

22

23

24

25

I N D E X

WITNESS

PAGE

LEVA KATANOV

DIRECT EXAMINATION

BY MR. SAMUEL

265

CROSS-EXAMINATION

BY MR. SCHWEITZER

293

E X H I B I T S

Court's Exhibit 2 417

Court's Exhibit 3 and 4 418

Court's Exhibit 5 423